

RIGHTS OF TRANSSEXUAL GENDERS, THE NEW EMERGING FIELD OF LAW : A RESEARCH PAPER

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Abstract:- *In spite of national and international protections, transsexuals have been a neglected community worldwide. Baring few countries, there is no recognition of their rights and are sometimes forced to lead animal survival life. Before Naz Foundation's case, humiliation, torture and cruelty with the sexual minorities were mostly unnoticed in Indian society. In the said case, some legal protections were recognized by the higher judiciary in India. In this research paper, I have tried to recognize and suggest a mechanism to protect the rights of transsexuals (including sexual minorities). There are two possible remedies. The rights of transsexuals should be recognized as they are born in the name of third gender or under other nomenclature, as in Albania, or their rights mentioned under the constitution or in other statutes be protected under state mechanism. To protect the rights of transsexuals, I am suggesting to establish an **Intensive Research and Educational Center** for conducting research on the cause of transsexuality and to cure it by all possible treatments like psychological, hormonal, biological or surgical. The Judicial system should also be ready to protect and enforce the rights of sexual minorities which is new emerging field of law.*

Introduction :- The transsexuals are one who in some deeper sense believe that they are another gender than the sex they are born. Kuiper² defines transsexualism as -

“The phenomenon in which someone with the normal internal and external sexual organs of one sex has and incontestable conviction of belonging to another sex. Transsexualism often speak of experiencing this situation as an imprisonment in the wrong body.”

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2 Alekling Van Lenning, Kilburg University, The body has crowbar transcending of stretching sex, available on www.sagepublication.com

It can further be said that transsexual people are those who establish a permanent identity with the gender opposite to the gender identified at birth. Every human being naturally belongs to one of two discreet gender categories (Masculine or Feminine), which is determined biologically giving distinct sexual characteristics (male & female). A small number of people find the gender they are assigned does not match their gender identity - i.e. their inner sense of where they exist in relation to being boys/men or girls/women. A wide variety of terms can be used to describe persons whose gender identity is different from their gender label. Similar thing happens when sexual identity does not match with assigned sex, and, transsexuals are burning example of it.³

Transsexualism is an ancient phenomenon which became more widely known to the court only in 20th century because with the possibility of sex change surgery arising, transsexualism became visible. Transsexualism is a form of human diversity in sexual formation, reported since antiquity, in which an individual seeks to alter the individual's sexually differentiated body in order to bring it into sexual harmony with the individual's innate sexual identity or brain sex. For many decades, the medical and psychological communities have attempted to resolve the issue of how one's sex (whether an individual is male or female) should be determined for medical purposes. Until recently, however, legal authorities generally have been blind to the need to define the terms male and female for legal purposes. The law typically has operated under the assumption that the terms male and female are fixed and unambiguous despite medical literature demonstrating that these assumptions are not true especially in matters related to sex and gender variation. The law has largely ignored other medical conditions in which an individual's sex may be ambiguous. Recent medical literature indicates that approximately one to four percent of the world's population may be inter sex and have ambiguous or no congruent sex features. Apart from inter sex persons, many more variation exist like transgender, transsexual and transvestite who constantly have challenged the socio-legal binary exemption and sex and gender. Thus,

³ Dr. Mithlesh Narayan Bhatt, Asstt. Professor (Law) Raksha Shakti University, Ahemdabad, Gujrat, "Trans sexual needs gender neutralization in marital laws – Page No.1" .

the manner, in which the law defines male, female and sex will have a profound impact on millions of persons⁴.

The case of Pinky Pramanic shows how transsexuals are treated in India. The Asiad Gold Medalist sprinter Pinky Pramanic was charged for committing rape with a live-in-relation, another girl. It is said that Pinky is male. But the confusing definition of sex and gender in India, defending Pinky is not going to be easy: not in a male dominated society with biological notion and sex and sexuality. Pinky says she is a woman. She has lived as one, competed as one, and has been identified as one. Only she, and, no other person or institution - particularly the law and medical science have the right to decide what her gender identity is, regardless of her anatomy, her chromosome or her hormone. As the investigation against her began, her claim to be a woman should have been accepted at face value regardless of whether narrow judgment of an appearance, manner physicality or dress led some to believe otherwise⁵.

Pinky was kept in a male prison. She was also handled and sexually tortured by male police personnel. The police prepared a video film of her gender test and then leaked the recording as MMS. This recording was done even without prior permission of the court. Thanks to West Bengal Human Right Commission, the High Court and Cyber Crimes Bureau initiated an enquiry on violation of rights relating to her body. This shows the social behavior regarding the sex and gender differentiation in India. Two figure tests⁶ to check the sexual character of female subject to rape and repeated cases of sexual assault of Hijras with impunity in police custody and other instances of police torture are the example of this social behaviour. It is indeed between law and medical science that the case will prove. The question of what she is will supposedly be answered by a

⁴ Dr. Mithilesh Narayan Bhatt- Asstt. Professor Law, Raksha Shakti University, Ahemdabad (Gujrat) - "Sex - Gender Variation and determination of sex and gender for legal purposes; Law, Theory and Practice".

⁵ Mr. Gautam Bhan - "The right to over bodies", The times, Monday July 9, 2012 at Page No. 10

⁶ In Lilu@ Rajesh and another vs. State of Haryana, Criminal appeal no.1226 of 2011 decided on April 9, 2013 by a bench comprising Justice B.S.Chauhan and Justice F.M. Ibrahim Kalifulla, J.J., The supreme court of India has held that the two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, be given rise to presumption of consent.

gender test. Pinky who has lived as woman throughout her life, which was her sense of her own gender, will be discounted and reduced to measures of her chromosomal and the hormonal behaviour that measure biological test on the assumption that it can be neatly categorized to male and female⁷.

We have much to learn from Countries like Argentina where citizens can legally choose their gender identity regardless of their biological sex. There are critical lessons to be learnt here about due process, the presence of gender variant citizens and their rights, and the role of privacy and dignity to all. ***Over all who will decide about the sex or gender of Pinky? Whether Pinky has any say in the present scenario about her gender? In my view, it is the right of Pinky to choose her gender, irrespective of her sex at the time of her birth.*** The neighbors of Pinky have seen her developing as a female. It is also said that Pinky underwent many sex determination tests before international competition even while being recruited in the Railways. There was never any dispute over her gender, but the controversy came on the allegation of rape⁸.

The handling of Pinky's case has horrified many medical professionals, human right and LGBT activists. Police took her to a private nursing home when she fell sick at the police station. There, they asked the doctors to examine her gender. The doctors concluded that Pinky had both male and female physical characteristics and the nursing home categorized Pinky as male. It is ridiculous under the law. The police do not have the right to ask any doctor to determine any one's gender, that too without the permission from the person. They have violated the law. And it was also medically unethical for the doctor to brand Pinky as a male on the basis of physical examination⁹.

Psychologists and psychiatrists say that the case could have been handled in a more sensitive way. A person suffering from sexual identity crises is already under a lot of trauma. They need a lot of counseling.

⁷ Mr. Gautam Bhan, "The right to over bodies", The times, Monday July 9, 2012 at Page No. 10.

⁸ J. Majumdar and Falguni Banarjee, "Run, Pinkey Run", The Times of India, Friday, June 22, 2012, Page No. 18.

⁹ Mr. Gautam Bhan, "The right to over bodies", The times, Monday July 9, 2012 at Page No. 10

Throwing the person in front of doctors for physical examination was not the right way of verifying her gender. This could have been handled in a more sensitive and human manner and not in such a harsh way. Counseling sessions would have made it easier for her to open up. It is tragic that a gutsy young girl who fought poverty and many odds to blaze the tracks is being treated so harshly by our society¹⁰.

Recently a transsexual from Kerala, Jaya Alizebeth Ninan, who changed her sex in Yanhee Hospital, Bangkok, was refused a change of name in passport. Previously she was Aashiq Koshy and her passport was in this name. To go for one gender to another in official records such as passport, driving license, birth certificate etc. she needed to first publish a notification in the government gazette. But when she forwarded her application for this, it was summarily rejected. She was told that changing name, caste and religion was permitted by law, however, there was no such provision when it comes to the gender¹¹.

This all shows how society treats the transsexual genders. In spite of social behavior favoring protection of their rights, transsexuals are treated very harshly. Although the Courts in India which are responsible for redressal of grievances of citizens and the administrative agencies recognize the terms 'sex' and 'gender' as being unambiguous, they are forced to determine an individual's legal sex under some limited circumstances. These cases typically have involved transsexual individuals whose biological sex does not conform to their self-identified sex. Unfortunately, the law has largely ignored other medical conditions in which an individual's sex may be ambiguous. Recent medical literature indicates that approximately one to four percent of the world's population may be inter-sex and have either ambiguous or no congruent sexual features¹².

Sex and gender are the most fundamental part of once identity and both have so many variation. Transgender and Transsexual are one of such variation. Although transgender people have been part of society

¹⁰ Ibid 9 at page no 2.

¹¹ Kerla Trnassexual Lands in Passport Pickle, The Times of India, Monday 15 October, 2012 at Page No. 1

¹² Julie A Grennberg, "Defining Male & Female", Inter sexuality and the collision between law and biology, Arizona Law Review summer, 1999, 41 ALR 265

in recorded human history, it only recently that they have been focused in medical science and law. To know the proper meaning of transsexuality, it will be proper to understand the co-related terms such as sex, gender and sexual orientation. Every known society has a gender / sex system, although the components and the working of this system vary widely from society to society, but the important question is: what is 'sex' and 'gender'.

Sex :- The words "sex", "male", and "female" are words in common usage and understood by the general population.

Black's Law Dictionary¹³ defines "sex" as

"either of the two divisions of organisms distinguished as male or female; males or females (especially men or women) collectively."

"Male" is defined as "designating or of the sex that fertilizes the ovum and begets offspring: opposed to female."

"Female" is defined as "designating or/ of the sex that produces ova and bears offspring: opposed to male." Webster's New Twentieth Century Dictionary¹⁴ defines the term female as "the sum of the peculiarities for structure and function that distinguish a male from a female organism; the character of being male or female."

Thus, sex classifies people as male or female. It does not do so along a visible line. The distinction rests on a cluster of biological indicia (including chromosomal, anatomical, and endocrinal factors) that do not themselves draw visible line that are in some cases continuous variables, and do not always co-vary in lockstep. So, while it is true the vast majority of people are unambiguously female or male, there are also some whose sex is indeterminate¹⁵.

On 26th March, 2007 a group of human experts launched the Yogyakarta principles on the application of Human Rights Law in relation to sexual orientation and gender identity. The principles are intended as a coherent and comprehensive identification of the obligation of States to

¹³ Black's Law Dictionary, 1375th ed. 1990

¹⁴ Webster's New Twentieth Century Dictionary, 2nd ed. 1970.

¹⁵ Lestie Green, Sex-Neutral Marriage, published in Current Legal problems, 2011, volume 64, at page no1.

respect, protect and fulfill the human rights of all persons regardless of their sexual orientation and gender identity¹⁶. The Yogyakarta principles recognize :

- (i) Human beings of all sexual orientation and gender identities are entitled to the enjoyment of all human rights;
- (ii) All persons are entitled to enjoy the right to privacy, regardless of sexual orientation or gender identity;
- (iii) Every citizen has a right to take part in the conduct of public affairs including right to stand for elected office, to participate in the formulation of policies affecting their welfare, and to have equal access to all levels of public service and employment in public functions, without discrimination on the basis of sexual orientation or gender identity.

Gender :- Gender is one's own specific way of interacting with and presenting oneself to the world. Gender is expression - physical, mental, spiritual, sexual, inter-relational, connective expression. Gender is how we relate to each other and to the world. Gender is how we move through the world. Gender is a sense of self in relationship to the world. One's sense of self is organic and inter-relational. Gender is that expressive, relational, embodied self. Gender is complex. There are many different gender expressions. Ideally, each of our genders is our own as defined by ourselves¹⁷. In Yogyakarta principles, gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

Sexual Orientation - Sexual orientation classifies people according to the relation between their own sex and the sex of the people with whom

¹⁶ Michael O Flaherty and John Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law : Contextualizing the Yogyakarta Principles"-Human Rights Law Review 8:2 (2008), 207-248.

¹⁷ Dylan Vade, "Expanding Gender and Expanding the Law: Toward A social And Legal Conceptualization of Gender That is more Inclusive of Transgender People", 11 Mich. J. Gender & L. 253*277.

they would, or could, enjoy sexual activities. Sexual orientation is even less determinate than sex, the indeterminacies of which it inherits. It compounds them with the further indeterminacy about it is to enjoy sexual activities, and even with it is to engage in what sexual activity with someone¹⁸. In Yogyakarta principles the expression “Sexual Orientation” is defined as follows:-

“Sexual Orientation” is understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender;”

Professor Adwin Cameron¹⁹ defines the sexual orientation as follows:

“... Sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex.”

Causes of Transsexuality :- On justification of my research hypothesis for this research paper, on the causes of transsexuality, I framed two questions in my questionnaire. I have received at least 500 answers to the questionnaire from different persons around the world. Almost 5% persons have reported transsexuality against the course of nature, whereas, 11% persons have referred transsexuality as punishment by God Almighty for misdeeds done by a person. But majority of persons have replied that causes of transsexuality is biological or genetic. The answers of the questionnaire were given by some experts in medical science and administration. Dr. S.S. Sandhu (MBBS & IAS) presently the Principal Secretary, PWD, Tourism and in the Office of Chief Minister of Uttarakhand, in his reply has stressed on Karma Theory as enshrined in the Geeta. As per the theory of Karma, explained by Dr. Sandhu, everybody receives the fruits of his deeds and misdeeds in the same life or in the lives to come. Dr. Harmeet Sandhu, the wife of Dr. Sandhu, associated

¹⁸ Lestie Green, Sex-Neutral Marriage, published in Current Legal problems, 2011, volume 64, at page no 4.

¹⁹ “Sexual Orientation and the Constitution: A Test Case for Human Rights” (1993) 110 SALJ 450.

with medical science for more than last 20 years, who has also conducted research in genetic science, stressed on the cause of transsexuality basically to be biological and genetic. Thus, in majority of the answers, transsexuality is said to be because of biological or genetic reasons.

Apart from the results of questionnaire, there are three medical theories of transsexualism: biological, gender dysphonic and psychoanalytic. The biological findings²⁰ are as follows:

“Supporting evidence has shown that transsexualism may be linked to limbic system abnormalities, which might occur during the earliest stages of brain development; EEG abnormalities might be linked to transsexualism; there may be unique hormonal factors associated with transsexualism; and there is a strong link between the presence or absence of the H-Y antigen and male and female transsexualism.”

Although some theorists reject the view that the cause of transsexualism is biological, many others see either biological explanations or a combination of biological and sociological factors manifesting themselves as gender role discordance. The gender dysphonic approach holds gender discordance as the motivating factor for transsexuals to express themselves in the opposite sex. This theory²¹ is the most accepted explanation of transsexualism to date.

Some argue that transsexualism is a purely psychological disorder because transsexualism does not have a known cause or origin like other biological conditions. Others argue that transsexuals should be included as a physical intersex syndrome. But at the Brain Bank in the Netherlands, studies support the hypothesis that “there is a brain sex difference between men and women, and transsexual people have the brain sex of that gender group to which they maintain they belong²².”

The answer to my questionnaire and interviews recorded by me and the above observations of different personalities of relevant field, on

²⁰ “Transsexualism as Metaphor: The Collision of Sex and Gender, Leslie Pearlman”, 43 Buff. L. Rev. 835, Buffalo Law Review Winter *868

²¹ 43 Buff. L. Rev. 835, 869.

²² Katie D. Fletcher, Judge Lola Maddox, “In Re Marriage of Simmons : A Case for Transsexual Marriage Recognition”, 37 Loy. U. Chi. L.J. 533, Loyola University Chicago Law Journal Spring 2006, 544.

the causes of transsexuality, it is clear that transsexuality is due to the biological, genetic or sociological factor. It is neither against the course of nature nor against the dictates of God Almighty.

Rights of Transsexual Genders :

Transsexuals are not treated as normal human being in the society. The person born with any sexual abnormality should be recognized as such with all the available constitutional, legal and civil rights including the right to work. Legally the Constitution of India protects certain rights of citizens and persons. Every person has a right to life and personal liberty. Every person means male, female and any person amongst the sexual minorities. It does not mean that only male or female have such rights. Sexual orientation in Naz Foundation's case and in so many other judicial pronouncements by the Supreme Court has been held to be a fundamental right. Such rights are almost available in all the democratic countries. But in practice the situation of transsexual genders, barring few countries, is very pathetic. To prevent the exploitation and violation of this right, State intervention is imminently required.

We have experienced violation of all possible human rights available to transsexuals. In this article, I am advocating the following rights of transsexual genders.

1. **Right to live as born :-** From various researches, it is evident that 2 to 4 percent of world population is transsexual. If it is considered that minimum 2% of the world population is suffering with this biological or genetic deformity, there should be more than 200 million transsexuals in India. But actual figure approximately is almost 2.5 million. The reasons for such a less number available in India are that exact numbers of transsexuals born in India are not recorded and possibility of survival is very much less. There are 3 possible treatments with the children born with some sexual abnormality.
 - a. The first option is the elimination of the transsexual child. This is a very strong possibility because the transsexuality in Indian society is considered a curse. To my surprise, in one of the answer to my question regarding transsexuality,

one of the research scholars, conducting research in law from Kurukshetra University, Kurukshetra, has mailed me that transsexuality in India is a curse. We should not even discuss the issue. What can be done is to think about their rehabilitation. I have also received similar views from all corners of the society. From different interviews, on the issue of prominent personalities who have visited the world at large, at least the prominent countries, it is also clear that Poland, Netherlands, France, Germany, Australia are the countries who have recognized the rights of transsexuals. If the number of transsexuals in above countries is seen, they are very much in higher percentage in comparison to India. Thus, the possibility of elimination cannot be ruled out. Meaning thereby, when the parents, by external physical appearance, finds some sexual abnormality in the newly born child, the possibilities of elimination in Indian society is much higher. If there is no apparent physical appearance of any sexual abnormality, the child is accepted with the physically apparent sex.

- b. The second possibility is abandoning the child to overcome the trauma of abnormal sex appearance. The child born with some sexual abnormality is abandoned in fear of social stigma.
- c. The third possibility is to hand over the child to a group of transgender people. In such case, the child is brought up as transgender since handing over. It has also come to my notice during the interview of Madam Rajni Rawat, head of the Transgender community in Uttarakhand, that normal girl child having slightly enlarged labia majora was handed over to her under doubt of being transgender child. Thanks to Almighty God that good sense prevailed on Madam Rajni Rawat, and on medical examination, the child was found to be absolutely normal. The girl child, as stated by Madam Rajni Rawat was handed over to the parents. The parents reluctantly received the custody of the child as they had told the neighbours and relatives that the child was dead.

It has also come to my notice that sometimes a complete normal person behaves like an abnormal sex case to earn a livelihood. Due to lack of mechanisms preventing the violation of rights of transsexuals, such persons are easily defrauding society. In the absence of any legislation and administrative policy decision, such persons are also defaming the real transsexual persons.

Thus, right to life and to live in the family and society is first and essential right. If any practice infringes this right, it will prevent future generation to exist. Whatever it may be - feticide, infanticide or the elimination of abnormal sex children, it violates the right to life. Here right to life means the right of transsexuals to live in family and society. This right can also be correlated with the right to life and the personal liberty as enumerated under Article 21 of the Constitution. Every child of any sex and gender or with any physically abnormal sexual appearance has a right to live comfortably and with dignity in the family. This can be justified socially, ethically, morally and legally. Almighty God cannot do any wrong. So, ethically, any child of abnormal sexual appearance is not the wrong committed by God Almighty. The child should be accepted as such by the family and the society. What is the wrong committed by the child if born with some abnormal sexual behavior? If it is not wrong, how can society punish the child by labeling the transsexuality as a curse? So, ethically, morally and socially, the child has a right to live with the family and society with dignity. During my research work, at least 95 percent persons who have answered the questionnaire and were interviewed by me have stressed that children born with physically apparent sexual abnormality have the right to live with the family and if the parents due to some stigma are abandoning or eliminating these children, they should be punished by law enacted by the Parliament.

It is also clear that law alone cannot change the society. It is the inhabitants living in the society themselves who can

contribute to change in the society. Law just guides the inhabitants to step forward for well-being of its inhabitants. That is the reason, it is said that law cannot be static. It has to change itself in changing circumstances of the society. Meaning thereby, the law succeeds the society and not proceeds. Simply put, the law is for the society and not vice versa.

2. **Right to Good Treatment** :- Negatively it can be said to be right against torture and ill treatment. In Naz Foundation's Case²³, Hon'ble High Court of Delhi has specifically mentioned how the sexual minority community is treated in the society and by district and police administration. At the international level, most of the attention to transsexual and inter-sexual human rights has focused on violations dealing with administration of justice, issues such as torture and ill treatment and arbitrary detention. Recently, Pinky's case is an example. These types of violations are usually the most visible forms of state-sponsored persecution and, hence, the easiest to document and address. Several human rights mechanism already report and comment on the torture and ill treatment of sexual minorities. In addition, the perception of violation against physical integrity makes them powerful starting point for advocacy.

The prohibition against torture is contained in two relevant international instruments, namely,

1. The ICCPR²⁴. This covenant recognizes that these rights derive from the inherent dignity of human person. It also recognizes that in accordance with the universal declaration of human rights, the idea of free human beings enjoins civil and political freedom, and freedom from fear can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights. Article 1 of the Covenant provides

²³ Naz Foundation v. Govt. of NCT Delhi and others (2009) 111 DRJ 1

²⁴ International Covenant on Civil and Political Rights, adopted by General Assembly of the United Nations on 19 December 1996

that all peoples have the right of self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. Article 6 provides that every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. Likewise, Article 7 provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 9 contains the provision regarding arbitrary arrest and detention. Article 9 provides that everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. Article 16 also guarantees the recognition of everyone as a person before the law. Article 17 provides that everyone has the right to the protection of law against such interference or attacks. Article 23 provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. Article 24 is regarding the protection of children and provides that every child shall have, without any discrimination, as to colour, sex, language, religion, national or social origin, property or birth - the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state. It also provides that every child shall be registered immediately after birth and shall have a name and accordingly every child has the right to acquire a nationality.

The above provision protects the rights and interests of a transsexual child as well and transsexual persons.

2. Convention against torture and other cruel, inhuman or degrading treatment or punishment adopted by General Assembly of United Nations Organizations on 10th December, 1984: Article 1 of the covenant defines the term 'torture' which means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a

person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Article 2 of the covenant provides each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. Article 3 of the covenant provides no State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. Likewise Article 4 of the covenant provides each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

The numerous instances of torture present a relatively easy case to decision makers, who may be generally hesitant about recognizing the human rights of sexual minorities. Despite its usefulness in getting decision makers to recognize the humanity of sexual minorities, torture is only a starting point for addressing the myriads of violations against sexual minorities. Given its status in international law, torture paves a relatively non-contentious inroad into the potentially contentious area of sexuality.

In Naz Foundation’s case²⁵ in para no. 7, it is specifically mentioned by High Court of Delhi how the sexual orientation rights of transsexuals or sexual minorities served as the weapons for police abuse; detaining and questioning,

²⁵ Naz Foundation v. Govt. of NCT Delhi and others (2009) 111 DRJ 1

extortion, harassment, forced sex, payment of hush money; and perpetuates negative and discriminatory beliefs towards same sex relations and sexuality minorities. In para 21 of the judgment Hon'ble High Court of Delhi has mentioned some incidents, which show the barbaric acts of police and administration and even by society towards sexual minorities. The first example is "Lucknow Incident of 2002" relating to the police harassment and torture with the members of a local NGO Bharosa Trust working in the area of HIV/AIDs prevention. Four health workers were arrested and detained on the charge of unnatural offences and on the ground of recovery of obscene material. The health workers remained in custody for 47 days only because unnatural offence was a non-bailable offence. The second is the "Bangalore incident of 2004" regarding the instance of custodial torture of LGBT persons. The victim of the torture was a hijra (EUNUCH) from Bangalore who was at a public place dressed in female clothing. The person was subjected to gang rape, forced to have oral and anal sex by a group of hooligans. He was later taken to police station where he was stripped naked, handcuffed to the window, grossly abused and tortured merely because of sexual identity.

A reference may also be made to a judgment of the High Court of Madras²⁶, in which the eunuch had committed suicide due to the harassment or torture at the hands of a police officer after he had been picked up on the allegation of involvement in a case of theft. There was evidence indicating that during police custody he was subjected to torture by a wooden stick being inserted into his anus and some police personnel forcing him to have oral sex. The person in question immolated himself inside the police station and later succumbed to burn injuries. There are thousands of such incidents of fundamental right of violation of homosexual.

²⁶ *Jaya Laxmi v. The state of Tamilnadu*, (2007) 4 MLJ 849

Constitution of every country, specially the democratic countries contains the provisions for protection of rights of sexual minorities, but the provisions are confining as the paper arrangements.

3. **Right to Education :-** Education in India is a fundamental right. Any democratic society even a developed society cannot imagine to sustain without a quality education system. Few countries of the world have ensured education without discrimination on basis of sex or gender. Sexual minorities should enjoy this right, and accordingly, develop their mental faculty. In India, as the transsexuality is considered a curse, transsexuals even cannot think or dream of education, resulting in their backwardness. The very sexual behaviour prevents them from getting an education in educational institutions. No doubt, there is no bar in law for education of transsexuals, but in practice education for transsexuals is a dream. Recently, India has ensured compulsory education for all the children. So, transsexuals should also get education under the mandatory state mechanism. The mechanism may contain the provisions for punishment of parents and school administration, if education of transsexuals is neglected or refused.
4. **Right to Medical Treatment including the change of Sex:-** It is well determined that transsexuality is not a mental disorder. It is a biological or genetic problem or sociological factor. This problem can be cured by proper treatment. Unfortunately, there has not been any systematic scientific research in the world on the causes and cure of transsexuality. There have been some organizations in world at large recognizing the rights of transsexuals to change their sex from physical sex to psychological sex. Certain doctors (hospitals) in America, U.K., Canada, Germany, Australia, Thailand and Japan have developed the expertise and surgical skills in change of sex. But an exhaustive research on cause and cure of transsexuality is still a dream. In the present situation, psychological, biological or hormonal and surgical treatments are available for transsexuals. Now the question arises under what circumstances and conditions

these treatments should be permitted. The answer is obvious; to cure the biological and genetic infirmity. The treatment to cure the transsexuality should be from the state exchequer. In this article, I am suggesting a mechanism for all the States of global community to ensure proper research, treatment and education for the transsexual children. This mechanism is the establishment of *intensive research and educational centre for transsexual children*. I will be explaining the mechanism in short at the end of this research paper.

5. **Right to Social Security (change of name, religion, sex, gender etc. in the official records) :-** Recently a transsexual from Kerala, Jaya Alizebeth Ninan, who changed her sex in Yanhee Hospital, Bangkok, was refused a change of name in passport. When she applied for change of name after changing the sex by appropriate surgery, she was told changing name, cast and religion was permitted by law. There was, however, no such provision to change the gender. This is also the agony of transsexuals that they are permitted to change the sex from male to female or vice versa but they are not permitted to change the name in passport and other relevant documents such as birth certificate, school and college certificate etc. It requires an appropriate legislation so that this difficulty of changing name in relevant document is over. I am proposing a legislation '*The Protection of Rights of Transsexual Genders Act*' to be enacted by Parliament of India. Other member state of United Nations may follow the practice.
6. **Right to marry (Right to have a family and Children):-** Right to marry is a fundamental right. It cannot be taken away. The question is whether transsexuals should be permitted to marry. Different countries have different opinions in this regard. Almost all the countries have accepted and recognized the right of sexual orientation of every person including the transsexuals. The question of marriage by a transsexual came before the court in England in Corbett's case²⁷. It was decided that for the

²⁷ Corbett vs. Corbett

marriage point of view, the sex of transsexual will be sex of his or her birth. Meaning there by, if a male to female transsexual want to contract marriage with a male, his marriage will be void because the law considers him as a male as he was before surgery. However in Australia and New Zealand, the legal validity of marriage of a post-operative transsexual person in their chosen gender has been judicially upheld.

In some countries, the marriages of transsexuals have been recognized but without any permission to change the name in birth certificate. It is just like to allow a civil right at the cost of other. In Hong Kong this situation prevails. In England, however, under the changed social structure transsexual people are able to marry or enter into civil partnerships in their acquired gender under the Gender Recognition Act-2004²⁸. But in case of transsexual's marriage, it has to follow the restrictions which cover relationships following any previous marriage in the birth gender. In Singapore the marriage laws were amended to permit post operative transsexual person to be recognized in their chosen gender for marriage purposes only²⁹. This brought the law back into line with administrative policy, which, prior to the decision in Lim Ying's case had been to allow post-operative transsexuals

²⁸ The purpose of the Gender Recognition Act is to provide transsexual people with legal recognition in their acquired gender and it has provisions related to transgender marriage (Section 11). This gives effect to Schedule 4. Paragraphs 1 and 2 of Schedule 4 adjust the restrictions on marriage under section 1 of the Marriage Act 1949. There are, for example, restrictions on marriage between a woman and her ex-husband's father. The adjustments made there will mean that where one party to the marriage is regarded as being of the acquired gender, the restrictions cover relationships flowing from any previous marriage in the birth gender, i.e. a woman who is a male-to-female transsexual person may not marry her ex-wife's father. This provision is mirrored for Scotland in paragraph 7 and for Northern Ireland in paragraph 8. Paragraph 3 amends the Marriage Act 1949 to provide an additional exception to the obligation on clergy in the Church of England and the Church in Wales to solemnize marriages. A clergyman will not be obliged to marry a person he reasonably believes to have changed gender under the Act. No such provision is needed for Northern Ireland or Scotland as there is no obligation to solemnize marriages on the clergy of churches in those jurisdictions. Paragraphs 4 to 6 amend the Matrimonial Causes Act 1973, so that if at the time of a marriage one party to the marriage did not know that the other was previously of another gender, the former may seek to annul the marriage.

²⁹ Women's Charter Amendment Act 1996.

to marry according to their chosen gender, as well as to change the particulars on their national identity cards³⁰.

Transsexuals in the United States initially have not been afforded the right to change the gender on their birth certificate in all the states. Nor have there been marriage legally recognized in all the states. Judicial support exists for the proposition that the 9th amendment retains civil rights to marriage to the sexual minorities. In the present time, about half of the states and territorial jurisdiction in the United States have the statute that explicitly provides ways for post operative transsexuals to modify their birth certificate reflecting their new genders. Recently, there is a debate on the issue of same sex marriage. I am sure shortly in United States of America, same sex marriages and the marriages between the transsexuals will get the legal recognition.

In Australia, in reference to Kevin, validity marriage of transsexual³¹, is a ground breaking judgment of the family court of Australia concerning the right of transsexuals to marry. Kevin, a post-operative female-to-male transsexual, married Jennifer. Kevin had undergone hormonal treatment and sex affirmation surgeries. His sex indicator had been changed on his birth certificate and other legal documentation. The question faced by the court was whether Kevin was a man for the purposes of family law in Australia. The court stated that it is clear from the Australian authorities that post-operative transsexuals will normally be members of their reassigned sex. Holding that the sex of a person for the purposes of marriage is their sex at the time of the marriage, the court found Kevin to be a man within the ordinary, contemporaneous meaning of the word and declared his marriage was therefore valid.

In India we know that transsexuality is considered as curse, so there is no question of recognizing the marriages of transsexuals

³⁰ Debbie S.L. Ong, "The Test of Sex for Marriage in Singapore", (1998) 12 International Journal of Law, Policy and the Family, 161; and K.L. Ter "Transsexual marriages in Singapore", (1988) Vol 148 New Law Journal

³¹ Pamala As Katz, "the case for legal recognition of same sex marriage", 8 J.L. & Poly's 61, 62-1999 at 73-97

or the same sex marriages. Right of sexual orientation has been recognized without protecting the right to marry by sexual minorities. It is the half journey waiting for completion.

This all shows that there are different laws, rules and practices regarding the marriages of transsexuals.

Every proposal must also have a legal explanation. If in my research paper, I am proposing the legalization of the transsexual's marriages, it must also have the explanation of such legalization. The marriage statutes do not discriminate on the basis of sexual orientation. Constitutional protections are provided and extended to individuals, not couples. The marriage statutes do not disqualify individuals on the bases of sexual orientation from entering into marriage. All individuals, with certain exceptions are free to marry. Whether an individual chooses not to marry because of sexual orientation or any other reason should not be concern of anyone³².

On a question on the legality of the marriage of transsexuals, 73% persons answered that after proper treatment including SRS, if a definite sex can be assigned to a person, he/she should be permitted to marry irrespective of the fact that he or she would not be able to beget. In justification of the above, it can be said that the marriage of heterosexuals cannot be legally disturbed on the ground that the couple is enable to beget.

7. **Right to work :-** Every transsexual should be permitted to do dignified work. We should learn a lot from the small countries like Thailand, Indonesia and Malaysia recognizing the right to work of transsexuals. During my research process, I have recorded the interviews of so many transsexuals and specifically asked whether they require any political favour in support of their right to work. Hundred percent of transsexuals require the right to equal and adequate opportunity in all the vocations of public life, but refused for any political support. I am, in my research work advocating the proper and adequate opportunity

³² Lestie Green, Sex-Neutral Marriage, published in Current Legal problems, 2011, volume 64, at page no 2

to the transsexuals in all the vocations of public domain to protect their rights considering that they are deprived amongst deprived. If a transgender can be permitted to contest the election for any political post, how can they be deprived of the right to work?

In Yogyakarta principles which were adopted by 25 countries representatives of United Nations from all geographical reasons, it is specifically mentioned that every citizen has a right to take part in the conduct of public affairs including right to stand for elected office, to participate in the formulation of policies effecting their welfare, and to have equal access to all levels of public service and implementation in public functions without discrimination on the basis of sexual orientation or gender identity.

The right to serve the people as an administrator, police officer or member of the judiciary is denied to the persons born with abnormal sexual identity. Every state member of the world community should realize it that they are depriving a particular class of society of their valuable human rights. Before ensuring the right to public office, social recognition, educational avenues and economic liberty should set the precedent. In India the right to contest election has been recognized and provided to all persons without discrimination on the basis of sexual orientation or gender identity. But it seems to be just the beginning, there is a long journey ahead.

8. **Right to Privacy** :- Transsexuals and intersex people have not received any attention with respect to right to privacy. Mostly government bodies like police violate this right, when they arrest these guys.

Article 12 of the Universal Declaration of Human Rights (1948) refers to privacy and it states- “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

Article 17 of the International Covenant on Civil and Political Rights (to which India is a party), refers to privacy and states

that- “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation.”

The European Convention in Human Rights also states that-

- “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority except such as is in accordance with law and it is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the protection of health or morals or for the protection of the rights and freedoms of others.”

In India our constitution does not contain a specific provision as to privacy but the right to privacy has been spelt out from the provisions of Article 19(1) (a) dealing with the freedom of speech and expression, Article 19(1)(d) dealing with the right to freedom of movement and from Article 21, which deals with right to life and liberty.

U.S. Supreme Court³³ on the right to privacy has held-

“...if the right of privacy means anything, it is the right of the individual married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”

Before Supreme Court of India, in Kharak Singh’s³⁴ case the U.P. Regulations regarding domiciliary visits were in question and the majority referred to *Munn v. Illinois*, 94 US 113 (1877), and held that though our Constitution did not refer to the right to privacy expressly, still it can be traced from the right to “life” in Article 21. According to the majority, clause 236 of the relevant Regulations in U.P., was bad in law; it offended Article 21 inasmuch as there was no law permitting interference by such visits. The majority did not go into the question whether these visits violated the “right to privacy”. But, Subba Rao, J. while

³³ Eisenstadt v. Baird.

³⁴ Kharak Singh v. State of U.P., (1964) 1 SCR 322.

concurring that the fundamental right to privacy was part of the right to liberty in Article 21, part of the right to freedom of speech and expression in Article 19(1)(a), and also of the right of movement in Article 19(1)(d), held that the Regulations permitting surveillance violated the fundamental right to privacy. In effect, all the seven learned Judges held that the “right to privacy” was part of the right to “life” in Article 21³⁵.

The right of privacy thus has been held to protect a private space in which man may become and remain himself. The ability to do so is exercised in accordance with the individual autonomy. The right to privacy means the right to be let alone, is an interest that man should be able to assert directly and not derivatively from his efforts to protect other interests³⁶. Right to be let alone should be seen simply as a negative right to occupy a private space free from government intrusion, but also as a right to get on with your life, your personality and make fundamental decisions about your intimate relations without penalization.

The privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationship without interference from outside the community. The way in which one gives expressions to one's sexuality is at the core of this area of private intimacy. If, in expressing one's sexuality, one acts consensually and without harming other, invasion of that precinct will be a breach of privacy.

In this research paper I have already mentioned some provisions of Convention against Torture and other Cruel, Inhuman or Degrading treatment or punishment and international covenant on Civil and Political Rights relating to the Right to Privacy. The Right to Privacy of Transsexuals or the sexual minorities under the present political and executive scenario seems to be a dream in India. No doubt, certain NGO's are working to this

³⁵ Naz Foundation vs. Government of NCT of Delhi and Ors.(2009)111 DRJ1 DB

³⁶ Louis D. Brandeis, 4 HLR 193-th right to privacy.

end. By organizing conferences, rallies and on few occasions dharnas as well, they have attracted the attention of people toward the right of privacy of sexual minorities. The mindset of people cannot be changed overnight. It may take substantial time to recognize such untraditional rights. Moreover, ethics and morality also comes in the way of public thinking when they tried to overcome the traditional approach to recognize some basic human rights relating to privacy for sexual orientation. I am sure that mindset of the people toward this sexual minority community will be changed and this right will be accepted by majority of social structure as a basic human right.

Despite its presence in the UDHR³⁷ and the ICCPR³⁸ the right to privacy has not received much attention at the international level with respect to sexual minority. Little guidance on the right's meaning or scope is available beyond the Human Right Commission's General Comment 16 on Article 17 of the ICCPR³⁹.

9. **The Right to Asylum:-** The right to asylum is of particular importance when considering the International human rights of sexual minorities since sexual minorities frequently reside in countries that persecute them. In almost no other area of international human rights law is the dialectic between national and international law so pronounced.

The most relevant international human rights documents regarding the right to asylum are the 1951 U.N. Convention Relating to the Status of Refugees (July 28, 1951) and the 1967

³⁷ UDHR, art. 12: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the of the law against such interference or attacks.

³⁸ ICCPR, art. 17: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks."

³⁹ The Human Rights Committee can issue General Comments under art. 40, paragraph 4 of the ICCPR. Article 17 is dealt with in General Comment 16, The Right to Respect Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art. 17).

Protocol Relating to the Status of Refugees. The Convention and Protocol defines a “refugee” as someone who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. The Protocol Relating to the Status of Refugees incorporates this definition by reference.

According to the U.N. High Commissioner for Refugees: Under the 1951 Convention and 1967 Protocol, a person seeking refugee status must full fill five parameters

- (1) He or she is outside his or her country of nationality or former habitual residence;
- (2) He or she fears persecution (the subjective element);
- (3) Such fear of persecution is well-founded (the objective element);
- (4) Such persecution is “for reasons of race, religion, nationality, membership in a particular social group, or political opinion”;
and
- (5) Owing to such fear, he or she does not wish to return to his or her country of nationality or former habitual residence.

The right to asylum is also contained in other human rights instruments⁴⁰, basing the right on the law of the country to which the applicant is seeking asylum. According to Article 13 of ICCPR, an alien lawfully in the territory of a State Party to the present Covenant may be expelled from there only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

⁴⁰ Article 14 of the Universal Declaration provides that “[e]very one has the right to seek and to enjoy in other countries asylum from persecution.” Universal Declaration, at art. 14, para. 1. Article 13 of the ICCPR contains a much weaker right to asylum

On February 16, 1995, the Canadian Immigration and Refugee Board determined a transgender individual from Iran qualified as a “Convention refugee” based on his political opinion⁴¹. The board determined that: The documentary evidence is replete with evidence of how the restrictive Iranian regime views and represses any sexual expression which is contrary to its own standard. Such behavior and expression is perceived by the authorities as being a defiant demonstration of political opposition to the current regime. Having so found, it becomes redundant and unnecessary in this case to determine the issue of whether the claimant is also a Convention refugee because of his membership in a particular social group.

Above mentioned are some rights relating to transsexuals and intersex which are mostly violated. Transsexual and intersex children are facing lots of human rights violations which require the international attention.

Conclusions :- This was all about the rights of transsexual genders. The question arises, how above mentioned rights can be ensured and protected in reality. It is of no value if rights mentioned in Constitution, Statutes or in any other form are not available to the target group in reality. For protecting the rights of transsexuals, I am advocating and suggesting the following measures:-

- (1) Enactment of “The Protection of Rights of Transsexual Gender’s Act” by Parliament in India and legislatures of other members states of UNO; and
- (2) Establishment of Intensive Research and Educational Centre for diagnosing the cause and cure of transsexuality, and ensuring education to the transsexual children.

All the transsexual children as per scheme shall be transferred to the Institute just after six months of their birth. Children who have already come of age may also be taken up. Along with the research on transsexuality, sincere efforts should be made in the Research Centre to cure transsexuality. In the meantime, the transsexual children will get the quality education in the Centre itself.

The big task is to know the birth of every transsexual child. In this regard, I am proposing Constitution of a Task Force in every district.

⁴¹ Case No. V93-01711 (1995)

In India, District Magistrate, Superintendent of Police and Chief Medical Officer of the District should be the members of the Task Force. There should be a separate office at District Head Quarter of the Task Force. It will be having an independent web site. In the present scenario of medical science, it is clear that approximately 95% births in India took place in government shelter either in the hospital or under the supervision of government man power like Asha etc. This government machinery will be legally responsible to inform the sex of every newly born child to the Task Force. As soon as it comes to the notice of Task Force that any child with abnormal or ambiguity sex characteristic is born, the Task Force shall inform the Intensive Research and Educational Centre on its web site. Before the parents of such abnormal child takes any decision on the fate of the child, the psychologist/conciliator of Centre shall contact them and pursue them by motivation and conciliation for transferring the custody of child to the centre as soon as the child becomes the age of six months. Children with abnormal sexuality shall be the target group for the Centre. They will be treated and educated there. After treatment and providing quality education, they will be permitted to come back to the mainstream of society. This is a step forward for rehabilitation of transsexuals in India and in world community. If this plan is implemented, there shall be no transsexual without protection of rights within 20 to 30 years.

This is not merely a suggestion. As an interim mechanism, which is the outcome of my research, I have requested the Government of Uttarakhand for establishment of Intensive Research and Educational Centre. The Governor of Uttarakhand has appreciated my research project and ordered the Governor's Secretariat to place before him a complete blue print of the scheme, which is pending in the Secretariat.

If implemented, this will be a viable solution to bring transsexuals to the mainstream of Indian society and to the world community. This will also work as the rehabilitation process of transsexuals.
