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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

INSTITUTIONALISATION OF HETERONORMATIVITY IN LAW

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ABSTRACT:

Heteronormativity is a social construct or an ideology that normalises heterosexuality. Heteronormativity is a long-standing social norm that enforces the notion that heterosexuality is the standard sexual orientation and further enforces gender binary. Heterosexuality in the context of heteronormativity is not just a mere sexual orientation but is interpreted and considered as a social perception in itself that enforces the normalisation of the idea that heterosexuality as the default and gender binary as the only acceptable forms of gender orientation. Normalised heterosexuality presupposes heterosexuality as the “standard” or the “default” and imposes gender specific behaviours. Heteronormativity imposes gender- specific roles to the detriment of not only gender non-conforming and gender queer individuals, but also to the cisgendered population. Normalised heterosexuality comes with preconceived gender roles and gender behaviour attributed to men and women alike and expects them to fit into such roles naturally.

Heteronormativity has been deeply rooted in the society as the standard and it imposes gender roles which contributes to the gender-based discrimination and gender stereotyping in social institutions such as education, religion, workplace and the judiciary etc. The aim of this article is to shed a light on how heteronormativity has manifested itself in the social institution of law.

INTRODUCTION

Law, to an extent, is the manifestation of the notions construed by the society. Law is not autonomous, nor is it arbitrary. Rather, law is deeply embedded in a society and regulates social behaviour and the functioning of the society in which it operates. Law both reflects and impacts the ways in which a society is constructed. The constant changes in a society and socially construed perceptions reflect in the requirement for amendments that are to be consistently made in law. It is for that reason that law is and should be dynamic and adaptable. If law is rigid and not receptive of change, then it simply denotes that the very principles that should guide and rule, is unable to be abreast with inevitable developments that are a product of time and evolution, and is

rendered redundant. Law regulates a society while society influences the law, and neither can function disjointly without each other. The reason why legal principles differ from each state is reflective of the nature of law to be a product of the societal standpoint and culture of the respective state. It is therefore, not a matter of wonder that the social construct of heteronormativity has been institutionalised in law as well. The institutionalisation of heterosexuality in law, perpetuates the idea that, heterosexuality and implied gender binary that is a ramification of the same, is not regarded as a social and political construction and a mode of organisation but is rather taken for granted as the so-called normal or the default mode of being. Such institutionalisation contributes to the seemingly discriminative legislations that establishes a privilege for individuals conforming to heteronormative standards while gender non-conforming and homosexual individuals have to strive hard to make such rights available to them since such and identification is not considered to be “normal” under the heteronormative school of thought.

WHAT IS HETERONORMATIVITY?

Heteronormativity is a pervasive social construct similar to patriarchy which serves as a rudimentary structure that dictates the way in which social roles and social relations operate. Heteronormativity as a concept is not as complex as it sounds, nor is it rarely occurring and encountered by the layman. Heteronormativity is persistent in every gender reveal party where the biological sex of the child is revealed before birth and gender is wrongly attributed and accounted as the biological sex and therefore gender is only man or woman, boy or girl, corresponding to the biological male and female. Heteronormativity thrives in every “you will get a good man to be your husband” said to a woman, in every “how will you take care of your wife and children if you do not have a decent job” said to man. It exists in every presupposition of heterosexuality to every individual as the default sexual orientation, in every gender assignment that attributes corresponding biological sex to be the gender one identifies with. Heteronormativity is as deeply embedded in the society as patriarchy is, in fact heteropatriarchy is the system where patriarchy and heteronormativity converge and divides the society based on gender roles and hierarchy that are derived from biological anatomy.

Before we understand what heteronormativity is, how it assigns gender roles, how it creates gender hierarchy and gender stereotypes, it is important to understand what gender, sexuality, and heterosexuality is. Gender in the most fundamental sense is a social identification pertaining to an individual and their mentality. The common misconception with respect to gender is that it is mixed up with one’s biological sex which is typically assigned at birth and is either male, female

or intersex. Gender on the other hand, is sociological and predominantly psychological pertaining to one's identification and encompasses the identities man, woman, transgender, gender non-binary, a-gender, gender queer and so on. Therefore, gender is the compilation of the socially constructed roles, behaviours, expressions and attributes that one identifies with. Gender is not merely binary as in the identities of man and woman corresponding to the biological sex of male and female as it has been established traditionally by heteronormativity, patriarchy and other conservative schools of thought. Before we delve into how heteronormativity has established gender binary, it is imperative to understand that gender is a spectrum. Since gender is sociological and psychological in the way that it is perceived and applied by each individual, it cannot be restricted to merely two expressions. Gender identity cannot be confined to mere binary, nor can it be static since there is always a considerable diversity in the ways individuals and groups experience, express, understand and exhibit gender and the gender roles they want to take on for themselves and with the way gender is institutionalised in society as mere binary, these expressions and experiences by various gender identifiers alter accordingly as well.

Heteronormativity is therefore described as the hegemonial or the dominant social ideology which justifies the binary gender system as biologic by assigning gender on the basis of physical attributes. The binary gender norm as established, only recognises two genders that corresponds to the biological male and female and defines sexual attraction between these two genders as natural. Heteronormativity does not recognise the existence of any other genders beyond the binary and does not recognise not does it vindicate any kind of attraction other than the one between these two opposing genders. Any person, for instance a transgender or a gender queer person or a non-heterosexual who does not adhere the expectations of the binary gender norm are defined and perceived as being "different" from the pre-conceived standards. The system of heteronormativity structures powers between genders and sexual orientations. Any deviation from the alleged norm of heteronormative standards is viewed negatively and leads to unequal treatment and discrimination. Heterosexism is the devaluation of people whose gender identity does not fit in the heteronormative categories of gender roles, gender relations and sexuality.

Heteronormative functions around the belief that there are only two genders that are opposites of each other and are reflective of the biological sex and these genders have natural roles that are derived from the nature of the gender itself and that these two genders are bound to be sexually attracted to each other only, thus normalising heterosexuality and assigned gender roles.

Normalised and normative heterosexuality perpetuates gendered divisions in society and various social institutions. Heteronormativity is the normalisation of traditional gender arrangements as perceived in a patriarchal notion that is fuelled by the concept of compulsory heterosexuality. Therefore, heteronormativity perpetuates traditional gender hierarchy and gender stereotypes that are outcomes of patriarchal system of traditional gender arrangements and affects the way in which gender is dealt with in various social institutions such as marriage, education, government etc.

HETERONORMATIVITY IN LAW

Law in India is intrinsically shaped on the rudimentary ideologies, values and conventions that the society carries. Law contributes to the establishment and maintenance of heteronormativity within the social structure. The way that the law operates, it seemingly makes heterosexuality and gender binary the default, in the terms that it uses, in the rights that it offers, it is apparent that heterosexuality is often granted the privilege while non-conformity to gender binary and heterosexuality leaves such individuals belonging to non-heteronormative roles and groups, having to fight to be granted such rights.

It cannot be denied that law grants the privilege to the cisgender heterosexual in a way that it has normalised heteronormativity that instils gender binary as the standard and the default. The terms used by Indian legislations and the rights that are naturally granted and devolved upon cis-gendered heterosexuals since compulsory heterosexuality and gender binary is considered as the standard until identified otherwise by the subject, denote the heteronormative nature of law.

India has not yet legalised same-sex marriages and the provisions pertaining to marriage are derived from religion and societal norms. Opponents of same-sex marriage and grant of marriage equality perceive marriage as a traditional institution which is founded upon the notion that gender is only binary and the only two genders are opposing to each other and marriage is the union of the two opposing genders. They argue that the grant of marriage rights to homosexuals and gender non-conforming individuals will taint the institution of marriage which is only applicable to heterosexual people since heterosexuality is considered to be the standard, often the will of God and man. The differentiation between “traditional marriages” which are heteronormative and same-sex marriages in itself creates the divide and perpetuates the idea that any identification that is not heteronormative, is not normal and is not natural. The legal protection guaranteed to heterosexual marriages are not extended to same-sex marriages and marriages involving gender

queer individuals since heterosexual marriages are regarded as the “traditional” form of marriage and thus the maintenance of such an institution of marriage discriminates and excludes individuals that do not fit into the heteronormative status and norms by treating them as second grade citizens and depriving them of civil rights. The privilege of heterosexuals and cisgendered people is sustained by the enforcement of heteronormativity and the legal discrimination to exclude people that do not fit into the heteronormative standards and roles from being given the full range of civil rights. It is however, to be noted that the relationship between law and heteronormativity is quite variable and alters with the change in societal perceptions and improvements accordingly. The devolution of equal rights to homosexual and gender queer individuals in terms of marriage and other civil rights in certain parts of the world is reflective of that particular society and the progress it had managed to make with respect to breaking free from heteronormativity to an extent. Even though certain countries have granted marriage equality for all, it is to be noted that, such legalisations have only warranted the inclusion of gender non-conforming and homosexual individuals in the heteronormative system. However, the assumptions and perceptions based on which such heteronormative system was built in the first place is yet to be challenged and dismantled. Law and legislations have been framed in a way that they protect and maintain heterosexual social arrangements that impose gender binary, gender hierarchy and gender roles even though such an arrangement is detrimental to gender and sexual minorities including women. In India, marriage and laws governing marriage, are heteronormative and referred to as a heterosexual institution associated with procreation. Marriage laws in India are guided by personal laws which are derived from religion. The heteronormativity of religion is a well-established principle and is therefore no wonder that the laws that derived and are reflective of religions are heteronormative as well. Specifically, for the purpose of marriage, personal laws only envisage marriage between a ‘Man’ and a ‘Women’ even though none of these personal laws have explicitly defined ‘marriage’, as a ‘Heterosexual union’. However, “traditional marriage” is considered to be the union of a cisgendered man and a cisgendered woman.

The Hindu Marriage Act, 1955 which is applicable Hindus, Sikhs, Jains, and Buddhists, specifies in section-5(iii), which provides the “conditions for a Hindu Marriage” that the ‘Bride’ and the ‘Bridegroom’ must have attained ‘Eighteen’ and ‘Twenty-one’ years of age respectively, for the purpose of marriage. The terms ‘Bride’ and ‘Bridegroom’ used in this provision implies that marriage under the Act is between a heterosexual man and a heterosexual woman, thus establishing the fact that “traditional marriage” is heteronormative in the context of law and the society.

Under the, Christian Marriage Act, 1872, Section 60 provides that the age of ‘Man’ and ‘Women’ should be ‘Twenty-one’ and ‘Eighteen’ respectively, for the purpose of marriage, therefore, once again denoting that the union is heteronormative in all sense of the word.

Marriages under Muslim law is considered to be a ‘Heterosexual Union’ as well and are not governed by any statute, therefore they do not have a specific definition of marriage. However, marriages among Muslims are in the nature of an agreement, with the objective of ‘procreation’, which reinforces its heteronormative nature.

GENDER STEREOTYPING AS AN OUTCOME OF INSTITUTIONALISED HETERONORMATIVITY

The stereotypes pertaining to a woman’s role in a family and society are a derivative of institutionalised heteronormativity. Heteronormativity imposes gender roles by attributing certain characteristics to a gender by inferring from the so-called inherent biological nature attached to that specific gender. The presumption that gender is binary and is corresponding to the biological sex of a person is in itself an outcome of heteronormativity. It is this ideology that gender is categorised based on physical, emotional and mental characteristics and capacities which are somehow intrinsic and are an outcome of the corresponding biological sex is a conception of instilling heteronormative line of thinking.

The act of criminalising abortion or allowing abortion only in highly restricted circumstances in various jurisdictions have been reported by human rights bodies as a discriminative act, and to be in violation of women’s rights to health and privacy. Gender stereotypes about women are the rudimentary basis for these laws. In particular the preconceived notions that women are unable to make their own decisions about reproduction, and their need to be controlled. Anti-abortion laws not only undermine the autonomy of a woman to make decisions about her reproductive health, but also perpetuate the sex-role stereotype that essentializes women as mothers and instrumentalizes them as reproductive vessels and imposes the role of women to primarily be considered as tools for reproduction. Anti-abortion laws and laws that criminalise abortions are also catalysts for other harmful gender stereotypes which vilifies any woman who seeks or has received abortion services, or is suspected of having obtained an abortion, with criminal activity and branding them as having failed to perform their duty as women and therefore shunning them. Gender stereotypes have always been utilised to coerce individuals, particularly girls, into marriage without their consent, in violation of their rights. The practice of child marriage still

persists due to the stereotypes that attribute certain characteristics to women's roles and sexuality. Consequentially, they also enforce patriarchal systems of control over girls' bodies and lives ending up in the process of entrenching their subordination.

These stereotypes insinuate that women and girls are in need of protection from men who are considered promiscuous and irresponsible and that women are dependent on men for their financial security, and also that women are the property of men, which justifies control of their sexuality and the perpetuates primary value placed on their virginity. These stereotypes unfairly to the detriment of women, underlie the pressure on women and girls to get married in many contexts. A stereotype that is still persistent that is used to justify child marriage is that girls are more mature than boys and therefore ready to marry before 18, the usual age of majority. These stereotypes are enforced and are utilised to strip women and girls of their autonomy and agency and to reinforce a view of women and girls as commodities and properties.

CONCLUSION

Heteronormativity is fuelled by institutional, cultural and social practices that furthers the notion that there are only two genders and these two genders are identification of the corresponding biological sex and the eventual compulsory attraction only between these two genders. The prevalence of heteronormative thinking is fuelled by its maintenance through social and cultural institutions that function on such basis. Gender hierarchy is the social practice that maintains and explains the ways in which men are dominant to other gender identities. Gender hierarchy justifies that, men are naturally superior to women and other gender identities and such a superiority is a derivation of the biological sex and the qualities attributed to and deemed to be derivative of the same. Heteronormativity imposes gender hierarchy in the context that the roles that men and women, the supposedly only two genders under heterosexual normativity, fall in naturally as a result of their biological sex and the qualities that are derived from it. Heteronormativity furthers the justification that gender hierarchy offers for the subordinacy of women by normalising gender binary and by attaching gender roles as derived from the biological sex and abilities. Thus when social institutions reflect and operate on the basis of such an ideology, heteropatriarchy will become so deeply rooted in the society and social practices, thereby resulting in discriminative and prejudicial treatment to more than half the section of the society. Law being the most powerful tool that commands the operation of a society, is obligated to perpetuate equity and not operate prejudicially.