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# UNIT 11 HETERONORMATIVITY IN LAW

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## 11.1 INTRODUCTION

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A presumption that everyone is heterosexual and setting heterosexuality as 'normal' or a 'default' sexuality establishes heteronormativity in a society. In any heteronormative society, the laws also tend to be based on the presumption of heterosexuality. This unit attempts to explore the concept of heteronormativity and identify some of the laws in India that are heteronormative-based. Although some notions of heteronormative laws are being challenged with judicial interpretations of constitutional law, there are many laws in India which are inherently heteronormative. Some of the examples of such laws are discussed in this unit. The unit also attempts to identify some of the problems with heteronormativity in law and concludes with a suggestion that there is a need to eliminate heteronormativity in law.

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## 11.2 LEARNING OUTCOMES

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After reading this Unit, you will be able to:

- Understand the concept of heteronormativity
- Identify how different laws in India are heteronormative

- Know the progress made by the judiciary in addressing some concerns surrounding heteronormativity in law
- Know how heteronormativity in law is exclusionary and affects queer lives negatively
- Recognise the need to change the heteronormative laws.

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### **11.3 UNDERSTANDING HETERONORMATIVITY**

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The European Institute of Gender Equality defines ‘heteronormativity’ as the assumption of a person’s heterosexuality. Heterosexuality is characterized by sexual or romantic attraction to or between persons of the opposite sex and the presumption is that there are only two sexes namely male or female. Heteronormativity is the assumption that sexual or romantic attraction exists only between a male and a female and that only such attraction is ‘normal’ and ‘natural’ and is therefore the norm. Accordingly, ‘heteronormativity is what makes heterosexuality seem coherent, natural, and privileged. It involves the assumption that everyone is ‘naturally’ heterosexual, and that heterosexuality is an ideal, superior form of sexuality.’ The American Psychological Association has defined heteronormativity as ‘the assumption that heterosexuality is the standard for defining normal sexual behaviour and that male–female differences and gender roles are the natural and immutable essentials in normal human relations.’

When the socially accepted norm is heterosexuality, it creates a bias in favor of this norm making its adherents ‘privileged’ and ‘normal’. Any deviation from this ‘normal’ is treated as ‘deviant’ or ‘abnormal’. Societies arrange themselves in order to minimize the deviance and abnormalities as they are perceived to be contrary to the accepted idea of coherence. Such deviance is perceived as an obstacle in the plan of achieving the ideal.

Social institutions are created to promote the ideal of heterosexuality creating a bias in favor of heterosexuality making heterosexuals a privileged class of persons. The manner of organisation of society itself is reflective of such a bias.

Even the norms created and adhered to in society carry this bias. Creation of norms which treat heterosexuality as an ideal and superior form of sexuality marks the origin of heteronormativity.

The subsequent adoption of heteronormativity in social institutions and structures as fundamental and natural reinforces this bias through social systems. Such a bias gives rise to systemic preferential treatment to heterosexuals.

Marriage and family as social institutions are classic examples of heteronormativity in a society. Marriage is viewed as a socially sanctioned union of a male and a female which not only legitimizes sexual relationships between them but also legitimizes the children born out of such relationships. It is a union conferring a status of husband and wife on the male and female in the union respectively. The same idea also flows from the majority of the religions across the world which consider marriage as a union of a man and a

woman in the holy matrimony sanctioned in the name of the higher power. The social and religious understanding of marriage is primarily heteronormative. Flowing from this heteronormative understanding of marriage, family as a unit is also perceived as inherently heteronormative which comprises of husband-wife and their children (usually joined by blood, marriage or adoption). Any other variation in this socially prescribed composition is not considered a proper marriage or a family. Even within a family, the roles of husband and wife, father and mother are extremely gendered. It is from these gendered roles that family as a unit and marriage as an institution derive their functionality.

Almost all the countries in the world have clearly identifiable heteronormative values. These values are reflected in the way the social institutions are organized. India is not an exception and deep-rooted heteronormativity pervades all walks of an individual's life in India.

Even for some social theorists, the assumption of heterosexuality is fundamentally embedded in and legitimizes the institutions, both social and legal, which results in devaluing, marginalizing and discriminating against the non-conformists.

Persons who identify themselves as gays, lesbians, bisexuals and transgenders are the ones who are consequently devalued, marginalized and discriminated against.

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## **11.4 LAWS REFLECTING HETERONORMATIVITY**

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Laws and legal institutions are influenced by the 'norm' of heterosexuality. Since the laws are made for society by people inhabiting the society, their personal biases are reflected in the body of laws. Such biases are evident not only in the rationale of the laws but also in the language of the law. This part explores some of the most prominent examples of the Indian laws wherein the 'norm' of heterosexuality is found in the codified laws.

### **11.4.1 Criminal Law (Indian Penal Code)**

The Indian Penal Code, 1860 (hereinafter the IPC) criminalizes certain forms of sexual behaviour. Section 377 of the IPC criminalizes 'unnatural sexual acts'. Homosexuality falls within such acts and therefore attracts punitive measures. The legislatures and judiciaries, throughout the world, justified the criminalization of homosexuality for challenging the established ideal of heteronormativity. The grounds which were relied on to justify the criminalization were public decency and morality. Section 377 of the IPC titled 'Unnatural Offences' lays down as follows:

“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation. Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

The constitutionality of this provision was challenged before the Delhi High Court and subsequently before the Supreme Court of India which resulted in some historic decisions. In *Naz Foundation v. Government of NCT of Delhi* [(2009) 160 DLT 277], the Delhi High Court interpreted section 377 of the IPC to exclude sexual acts between consenting adults from its purview. This effectively has resulted in decriminalizing homosexuality in India. In this case, it was submitted by the petitioners that the continued presence of the section 377 on the statute books has negatively impacted the rights of gay and transgender community guaranteed under the Indian Constitution. Their fundamental right to equality, the right to non-discrimination, the right to privacy, the right to life and personal liberty and the right to health are violated under section 377.

The Delhi High Court affirmed that right to privacy emanates from article 19's guarantee of freedom of expression and movement; and from article 21's constitutional promise of the right to life and liberty. A reference was made to 'the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity' which asserts the rights to equal enjoyment of rights of all persons regardless of their sexual orientation. The Court also concluded that section 377 disregards the dignity of the individuals and violates their right to personal liberty by criminalizing their identity based on their sexual orientation.

The Court also held that the laws discriminating among people based on their sexual orientation are violative of Article 15 of the Constitution of India. In this context, the Court stated as follows:

“We hold that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15. Further, Article 15(2) incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another in matters of access to public spaces. In our view, discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15.”

Additionally, the Court noted that section 377 while criminalizing same-sex relationships in private between consenting adults, is also contrary to the constitutional morality. The morality emanating from the Constitution of India which protects and promotes diversity and ensures an egalitarian society where freedom is no longer a privilege.

The decision of the Delhi High Court was challenged before the Supreme Court of India in *Suresh Kumar Kaushal v. Naz Foundation* [Civil Appeal No. 10972 of 2013]. The Supreme Court in utter disregard to the issues of sexual orientation and gender identities and its effect on the lives of persons of non-normative sexualities, held that the Delhi High Court's decision in *Naz Foundation* as legally unsustainable and was set aside. The SC judgement in the *Suresh Kumar Kaushal* judgement effectively reinstated the heteronormative law.

The decision in *Suresh Kumar Kaushal* was met with heavy criticisms both nationally and internationally. A review petition was filed against this decision and the Supreme Court delivered a decision in *Navtej Singh Johar v. Union of India* [2018 (10) SCALE 386]. A law that prohibits consenting adults to engage in same-sex relationships assumes heterosexuality not only as a default but as an ideal. Resultantly, it justifies devaluation, marginalisation and discrimination against the persons of, what Nivedita Menon calls, ‘counter-heteronormative’ sexualities. By the term ‘counter-heteronormative’ she refers to- ‘a range of political assertions that implicitly or explicitly challenge heteronormativity and the institution of monogamous patriarchal marriage’. [Outing Heteronormativity: Nation, Citizen, Feminist Disruptions in Sexualities, 3 (Nivedita Menon ed., 2007)]

### 11.4.2 Personal Laws relating to Marriage

There are various aspects concerning matrimonial relationships that have been the subject matter of different laws. These include issues around marriage, divorce, maintenance of the spouse and children, cruelty against the spouse, etc.

The right to marry and the right to divorce the partner under both religious personal laws and the secular law on marriage are conferred on the only heteronormative matrimonial unions. Personal laws namely, the Hindu Marriage Act, 1955 for the Hindus, the Indian Christian Marriage Act, 1872 and the Divorce Act, 1869 for Christians, the Parsi Marriage and Divorce Act, 1936 for the Parsi community, the uncodified Muslim law on marriages, etc. and the secular law i.e., the Special Marriage Act, 1954 do not recognize or confer validity on non-heteronormative unions akin to marriages. Consequently, they do not provide the right to seek divorce to the members of non-heteronormative unions akin to marriages. There are a few petitions are pending before different High Courts in India where the petitioners are same-sex couples are seeking legal recognition of their unions either under the Hindu Marriage Act, 1955 or under the Special Marriage Act, 1954. The judgements on these petitions are awaited.

Since only the heteronormative marriages are legally recognized, the families emerging from such marriages are inherently heteronormative. In such families, a right to claim maintenance is conferred on the wife and the minor children, as per section 125 of Code of Criminal Procedure, 1973.

Similarly, heteronormativity in law can be found in the definition of ‘cruelty’ against a married woman under the IPC evident from the combined reading of sections 304B (Dowry death) and 498A (Husband or relative of husband of a woman subjecting her to cruelty) only includes members of the husband’s family.

#### ***Check Your Progress-1***

- 1) *Write about criminal laws or Indian penal code.*
- 2) *Write your understanding about personal laws related to marriages.*

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## 11.5 LAWS RELATING TO ADOPTION

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In the case of adoption by married couples, both parties have equal rights, in fact, consent of both the spouses is required for adoption by a couple. Section 57 of the Juvenile Justice (Care and Protection of Children) Act, 2015 lays down the eligibility criteria for prospective adoptive parents. Though the term couple is not defined, since only heterosexual relationships are legally recognized, 'couple' in this law refers to heterosexual couple reinforcing heteronormativity in adoption laws. Additionally, section 57(4) restricts a single adult male to adopt a female child.

### 11.5.1 Offences of Rape and Sexual Assault

The rape law in India is also heteronormative and is based on the notions of masculinity. Accordingly, a man is always a perpetrator and a woman is always a victim or a survivor. Section 375 of the IPC while laying down the elements of offence of rape uses language where only a woman can be a victim of this offence. Following directions of the Supreme Court in *Sakshi v. Union of India* [AIR 2004 SC 3566], the Law Commission of India had reviewed the rape laws in India. The 172<sup>nd</sup> Law Commission of India Report recommended making rape laws gender-neutral. These recommendations were built upon by the Justice Verma Committee, following the Nirbhaya case to recommend necessary reforms in rape laws. Based on its recommendations, some major changes in the scope of sexual offences under the IPC were introduced. Though these changes broadened the scope of rape to include non-penile-vaginal acts of penetration, they still reinforce a gender-specific notion of rape. This gender specificity in rape laws conforms to the binary notions of gender and heteronormativity.

### 11.5.2 The Protection of Women from Domestic Violence

The Protection of Women from Domestic Violence Act 2005 permits wife/woman in a relationship in the nature of marriage to lodge a complaint against any form of domestic violence. This legislation indeed has been a step towards the protection of women. It aims to protect women from any act, omission or commission or conduct of a person if it harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the woman concerned. It also protects wife/woman from physical abuse, sexual abuse, verbal and emotional abuse and economic abuse. The scope of domestic violence is broad and this legislation accords statutory recognition and protection to aggrieved women in a patriarchal society. There is however no corresponding protection for men in non-heteronormative relationships. The laws are yet to recognize the concerns of homosexual relationships and address issues of abuse in such relationships.

### 11.5.3 Inheritance

Laws dealing with marriage and family, intestate succession under secular succession law, namely, the Indian Succession Act, 1925 and the laws on similar matters under personal laws are also purely within the heteronormative kinship.

### 11.5.4 Proposed Law relating to Surrogacy

The heteronormativity is also apparent in the proposed surrogacy law. The Surrogacy (Regulation) Bill, 2019 was introduced by the Minister of Health and Family Welfare. The Lok Sabha passed the Bill in August 2019. The Bill was subsequently referred to a Select Committee which has submitted its report on February 5, 2020. The Bill proposes to permit surrogacy (i) for intending couples who suffer from proven infertility; (ii) altruistic; (iii) not for commercial purposes; (iv) not for producing children for sale, prostitution or other forms of exploitation; and (v) for any condition or disease specified through regulations.

The eligibility criteria for the intending couple are as follows:

- the couple being Indian citizens and married for at least five years;
- between 23 to 50 years old (wife) and 26 to 55 years old (husband);
- they do not have any surviving child (biological, adopted or surrogate); this would not include a child who is mentally or physically challenged or suffers from life threatening disorder or fatal illness; and
- other conditions that may be specified by regulations.

Legally, a heterosexual couple can jointly parent by adopting a child but the same is not possible for non-heteronormative couples.

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## 11.6 PROBLEMS WITH HETERONORMATIVITY IN LAW

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The problems of heteronormative laws are evident from the experiences of queer lives and their challenge to the norm of heterosexuality. As noted above, heteronormativity results in devaluation, marginalization and discrimination against those who do not conform to this norm. Persons who identify as homosexuals, bisexuals or sexualities other than heterosexuality are the victims of heteronormativity in laws. When laws carry biases against the non-heteronormative sexualities, then the very purpose of law to protect the interests of persons is frustrated. The Supreme Court in Navtej Singh Johar judgement recognized that “the LGBT community is a sexual minority which has suffered from unjustified and unwarranted hostile discrimination, and is equally entitled to the protection afforded by Article 15.”

### 11.6.1 Heteronormativity in law is contra-Constitutional

The preamble of Constitution of India affirms securing Justice, Liberty, Equality, and Fraternity to all people of India and also assures protection of the Dignity of every individual. However, the heteronormative laws act as obstacles in achieving these Constitutional goals. As observed by the Supreme Court in Navtej Singh Johar judgement, criminalization of sexual behaviour of the sexual minorities defies Constitutional morality.

The Supreme Court held that the theme of inclusiveness permeates through Part III (Fundamental Rights) of the Constitution and a subjective notion of public or societal morality which discriminates against LGBT persons, and

subjects them to criminal sanction, simply on the basis of an innate characteristic runs counter to the concept of Constitutional morality. The prohibition against discrimination under Article 15 on the ground of 'sex' should therefore encompass instances where such discrimination takes place on the basis of one's sexual orientation.

Sexuality is intrinsically linked with one's sexual orientation and heteronormative laws take away the dignity from the persons of non-heteronormative sexual orientations. The relevant conclusions drawn in Navtej Singh Johar judgement are:

- Members of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution;
- The choice of whom to partner, the ability to find fulfilment in sexual intimacies and the right not to be subjected to discriminatory behaviour are intrinsic to the constitutional protection of sexual orientation;
- Members of the LGBT community are entitled to the benefit of an equal citizenship without any discrimination, and to the equal protection of law.

These conclusions and Constitutional interpretation laid down by the Supreme Court of India in *National Legal Services Authority (NALSA) v. Union of India and others* [(2014) 5 SCC 438], non-heteronormative gender identities and sexualities are protected under various fundamental rights such as Article 14 (right to equality) Article 15 (prohibiting discrimination against any citizen on the ground of sex), Article 21(right to life and personal liberty), etc.

Additionally, it is pertinent to note that the heteronormative approach of the law utterly disregards the scientific developments in the fields of psychology, sexuality studies among others, whereas developing a scientific temperament is a fundamental duty of every citizen of India as per Article 51A of the Constitution of India.

### **11.6.2 Heteronormativity in Law Disregards Human Rights of the Sexual Minorities**

In his concurring opinion in *NALSA* judgement, Sikri, J. stated that gender identification is an essential component which is required for enjoying civil rights by the community. Same is the case with sexual orientation/sexualities. It is only with this recognition that many human rights can be enjoyed meaningfully viz. the right to marry, the right to education, employment and health. The right to love and to a partner of choice, to find fulfilment in a same-sex relationship and right to have a family are other basic human rights which are denied due to heteronormative laws. Such laws perpetuate stereotypes, lend authority of the state to societal stereotypes and have a chilling effect on the exercise of freedom. As referred to before, the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity' assert the rights to equal enjoyment of rights of all persons regardless of their sexual orientation.



Heteronormativity in law contravenes the rights set out in the Yogyakarta Principles. Sexual orientation is an intrinsic element of liberty, dignity, privacy, individual autonomy and equality which are the basic foundations of human rights.

### 11.6.3 Heteronormativity in law results in victimisation of sexual minorities

When constitutionally guaranteed fundamental rights along with many other basic human rights are unavailable to the sexual minorities, their lives are devalued. Social intolerance and non-acceptance of sexual minorities combined with the absence of any legal protections causes marginalization and resultant victimization of the sexual minorities. Additionally, ignorance of the majority and labelling of the sexual minorities' lives as deviant, sinful, morally corrupt, mentally ill, etc. are reasons for criminal offences against sexual minorities such as harassment, bullying within and outside homes, hate crimes, sexual and other forms of violence. Without any protection of law, sexual minorities are subjected to further victimization with complete impunity. High suicide rates, high mental health issues because of societal non-acceptance and amplified intolerance towards sexual minorities further complicates their problems.

#### ***Check Your Progress-2***

- 1) *What is your understanding about heteronormativity in law.*

## 11.7 ADDRESS THE ISSUE

The default of heterosexuality resulting in heteronormativity in law is inherently exclusionary. There is a need to take certain measures to address the issues. The measures range from being educated and aware of it to actually taking concrete steps to change the heteronormative laws.

The first and foremost solution lies in understanding that the heteronormative laws negatively impact the lives of persons with non-conforming sexualities. Laws are meant to be non-discriminatory protecting all persons' interests equally without in any way promoting inequality, preferential and discriminatory treatment among individuals based on their sexualities. Understanding that the heteronormative laws result in inequality through proper education and sensitization constitutes merely the first step. It must be accompanied by the realization and internalization of the fact that the laws should not carry such bias. Internalization is a time-consuming process and would warrant the society to be ready to unlearn its already internalized default heteronormativity.

In *NALSA* judgement, the Supreme Court held that "gender identity, refers to an individual's self-identification as a man, woman, transgender or other identified category." In *Navtej Singh Johar* judgement, Indu Malhotra J. opined that the homosexuals "were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognize that homosexuality is a completely natural condition,

part of a range of human sexuality.”

In the meanwhile, there is a need to undertake directed deliberate efforts to change the existing laws which are heteronormative. Some laws may be required to be repealed and some may need to be amended in order to grant equal protection of laws to the sexual minorities in India.

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## 11.8 LET US SUM UP

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Heteronormativity is the assumption that everyone is heterosexual and norms are set based on this assumption. Such an assumption is contrary to the established facts. There are persons identified as sexual minorities who do not conform to the norms of heterosexuality. When the laws which regulate almost every aspect of human life also mirror heteronormativity, the persons of non-heteronormative sexualities are negatively impacted in distinct ways. First, by not recognizing their existence; second, by not guaranteeing equality to them before law; third, by marginalizing and lastly, by victimizing them. Even though after Navtej Singh Johar judgement it is no longer a crime for consenting adult persons to engage in same-sex relationships in private, there are no active steps taken to integrate non-heteronormative sexualities in the existing legal system. There are many laws that blatantly discriminate against sexual minorities, violate their human rights and devalue their lives. There is a need to take active positive steps in eliminating heteronormativity Indian laws in order to achieve the Constitutional goals of securing Justice, Liberty, Equality, Fraternity and Dignity of every Indian.

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## 11.9 UNIT END QUESTIONS

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1. Can you identify any other laws which are heteronormative? Give reasons.
2. Analyse the effect of heteronormative laws on the lives of sexual minorities.

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