

LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN INDIA

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Following the recent decision of the Supreme Court of India in Suresh Kumar Koushal v. Naz Foundation¹ (hereafter referred to as Koushal) upholding the validity of Section 377 of the Penal Code² that criminalises carnal intercourse ‘against the order of nature’, majority of the discussions have centred around the most effective way to get the decision overturned. This paper argues that it is also important to seek legal recognition of same-sex relationships simultaneously since discrimination on the basis of sexual orientation is objectionable whether under civil or criminal laws. Marriage laws only recognise heterosexual unions, depriving same-sex couples of the state benefits as well as social and legal recognition that married persons enjoy. The paper examines whether the route of recognition through ‘civil partnerships’ that has been taken by many other countries should be followed in India, but concludes that this is an unsatisfactory intermediate process to granting recognition to same-sex marriages. The author concedes that it would be unfeasible to seek amendments of personal laws to obtain such recognition since it would encounter strong opposition invoking religious freedoms. The paper concludes that the most viable manner of attaining legislative recognition of same-sex marriages would be an amendment of the Special Marriage Act³ or, in the event that Koushal were to be overturned, by a judicial reading down of the Special Marriage Act to permit same-sex marriages, on the ground that not permitting same-sex marriages unfairly discriminates against members of the LGBT community.

The struggle against social and legal discrimination of the lesbian, gay, bisexual and transgendered community (‘LGBT’) has been long and arduous. The initial objective of decriminalising private

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¹ (2014) 1 SCC 1.

² Penal Code, 1860.

³ The Special Marriage Act, 1954.

and consensual same-sex acts has been achieved in most countries either by legislation or by courts overturning such laws, though seventy-six countries, largely in Africa and West Asia, still retain such laws.⁴ On December 11, 2013 India re-joined these countries when the Supreme Court in Koushal upheld the constitutional validity of Section 377 of the Indian Penal Code, a hangover from the colonial days that criminalises “carnal intercourse against the order of nature”.⁵ Koushal reversed the progressive decision of the Delhi High Court in Naz Foundation v. Govt. of NCT of Delhi⁶ (hereafter referred to as Naz Foundation) that read down Section 377 to decriminalise private consensual sex between adults. Post the judgment, there has been wide-ranging discussion on the most effective method to obtain an over-ruling of Koushal.

In this paper, the author argues that it is not sufficient to merely work towards decriminalisation of same-sex acts but it is also necessary to seek legal recognition for same-sex relationships and examine the various options that could be pursued to obtain such legal recognition. Since this is not a mere technical legal question, but one that arouses passionate debate and affects the personal lives of many, the author has also factored in what may be termed as tactical considerations. The strong opposition that a vocal section of Indian society has against the aspirations of the LGBT community cannot be gainsaid. In India, where along with rapid modernisation, there has been growth of conservative and revivalist ideas,⁷ this opposition in the name of tradition, culture and religion, however misguided, will be strong and will act as an impediment to liberal legislation. Notwithstanding Koushal, it is believed that the judiciary is not fettered to the same extent. It is interesting to note that the writ petition by Naz Foundation was originally dismissed by the Delhi High Court on the grounds that there was no cause of action and merely academic issues could not be discussed by the court. This order was challenged in a special leave petition and the Supreme Court remanded the petition for fresh decision in 2006.⁸ One should not, therefore, conclude from Koushal that a progressive interpretation cannot be obtained from the Supreme Court.

⁴ UN Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, (November 17, 2011), <<http://www.refworld.org/docid/4ef092022.html>>

⁵ Indian Penal Code, 1860, S. 377.

⁶ (2009) 160 DLT 277.

⁷ SUNIL KHILNANI, *THE IDEA OF INDIA* 180 (2004).

⁸ *Suresh Kumar Koushal*, *supra* note 1, at paras 4-5.

I. THE IMPACT OF *KOUSHAL*

This paper discusses various courses of action, both legislative and judicial, to obtain legal recognition of same-sex relationships. While this paper does not primarily deal with *Koushal*, certain aspects of the judgment are relevant to the subject matter being dealt with.

Koushal holds that there exists a presumption of constitutionality of a statutory provision, and opined that there is a presumption that the legislature would act in the best interests of the people. In fact, it goes so far as to state that even pre-Constitutional laws may be considered a manifestation of the will of the Indian people.⁹ The Court overlooked that the decisions cited by it had pointed out that a valid law may become invalid with the passage of time.¹⁰

Secondly, the Court held that the classification between those indulging in carnal intercourse in the ordinary course and against the order of nature is intelligible, in order to hold that Section 377 was not violative of Article 14 of the Constitution¹¹. This ignored precedents which require a justification of the classification in relation to the stated objective being pursued.¹²

Thirdly, the Court held that Section 377 did not violate Article 15, providing no reasons whatsoever.¹³ This is particularly odd considering the most powerful and interesting section of *Naz Foundation* provided the judicial reasoning as to why discrimination on the grounds of sexual orientation was violative of Article 15 and that the term “sex” in the Article included “sexual orientation”.¹⁴ Similarly, the *Koushal* bench discussed several landmark cases under Article 21 but did not provide any reasoning as to how Section 377 is not in violation of Article 21.¹⁵

Finally, the Court stated that the decision to repeal Section 377 had to be left to the Parliament, effectively directing a group that it recognises as a minority that its rights should be protected by the majoritarian arm of government i.e. Parliament.¹⁶

⁹ *Suresh Kumar Koushal*, *supra* note 1, at para 28.

¹⁰ Vikram Raghavan, *Taking Sexuality Seriously: The Supreme Court and the Koushal case*, LAW & OTHER THINGS (December 16, 2013), http://lawandotherthings.blogspot.in/2013/12/taking-sexuality-seriously-supreme_16.html.

¹¹ INDIAN CONSTITUTION.

¹² *Suresh Kumar Koushal*, *supra* note 1, at para 42.

¹³ *Suresh Kumar Koushal*, *supra* note 1, at para 44.

¹⁴ *Naz Foundation*, *supra* note 6, at para 104.

¹⁵ *Suresh Kumar Koushal*, *supra* note 1, at para 51.

¹⁶ Gautam Bhatia, *The Unbearable Wrongness of Koushal v. Naz Foundation*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (December 11, 2013), <http://indconlawphil.wordpress.com/2013/12/11/the-unbearable-wrongness-of-koushal-vs-naz-foundation/>

These aspects of *Koushal* make it more difficult, as discussed later, to pursue several judicial options in relation to recognition of same-sex relationships. However, the Supreme Court has agreed to hear arguments on a curative petition filed by Naz Foundation. One of the grounds urged in the petition is that *Koushal* did not take into account the Criminal Law (Amendment) Act, 2013 that now criminalises coercive peno-non vaginal sexual activities. This, it is argued, by implication decriminalises such acts if performed consensually. Another ground in the petition is that the Court misread legislative intention in not amending Section 377 in 2013 – the Lok Sabha refrained from considering such an amendment since the matter was *sub judice*.¹⁷

Moreover, the Supreme Court's decision in *National Legal Services Authority v. Union of India*¹⁸ (hereafter referred to as NALSA) on the rights of transgenders gives reason for some cautious optimism. NALSA does not overrule *Koushal* and was, like *Koushal*, rendered by a two-judge bench. But there are several elements that can be used to overturn *Koushal*. First, it holds that one cannot distinguish between the sexual identity and sexual activities, whereas *Koushal* made such a fine distinction and thereby avoided the contentions that Section 377 was violative of Articles 14 and 15 by stating that Section 377 made a classification based on acts, not persons.¹⁹ Secondly, in NALSA, the Court stepped in when the legislature did not. Thirdly, it applied several international conventions and foreign judgements and the Yogyakarta Principles, all of which are opposed to Section 377. In fact, every part of the emphatic case made for a fundamental right to autonomy for every person to choose his own "gender" identity and would apply in equal measure to autonomy in choosing a sexual identity.²⁰ This paper, therefore, does not proceed on the basis that *Koushal* is the end of the judicial road for LGBT rights.

II. THE CASE FOR SAME-SEX MARRIAGE

It is unarguable that the initial focus has to be on de-criminalising consensual sexual acts. But this in itself will not end the discrimination faced by persons who are engaged in long-term committed relationships with others of their own sex. It would require legal recognition of long-term same-sex unions, on par with heterosexual marriages. This objective of seeking parity with heterosexual relationships itself may be critiqued on the grounds that heterosexual marriages and family relationships are imbued with the outmoded values of patriarchy. If a family is considered a microcosm of society, one cannot seek

¹⁷ *Naz Foundation files Curative Petition challenging the Supreme Court judgment on Section 377*, LAWYERS COLLECTIVE (Apr. 1, 2014) <http://www.lawyerscollective.org/updates/naz-foundation-files-curative-petition-challenging-supreme-court-judgment-section-377.html>.

¹⁸ (2014) 5 SCC 438.

¹⁹ *Suresh Kumar Koushal*, *supra* note 1, at para 42.

²⁰ NALSA, *supra* note 18.

to achieve radical changes in society while seeking acceptance into its traditional family norms. Both inside and outside the LGBT communities, there are differing views about the desirability of marriage—either in any given individual's personal life or as to government policies that use marriage as a condition for a wide range of benefits.²¹ There are, however, compelling practical reasons to seek social and legal recognition of same-sex relationships. Certain legal benefits such as succession, maintenance, and pension rights that are available to married couples are not available to same-sex couples. Economic benefits from laws like the Employment Provident Fund Scheme, 1952 and Workmen's Compensation Act, 1923 are given only to those related by blood or marriage.²² After the Central Adoption Resource Authority (CARA) issued guidelines for adoption, single persons and unmarried couples have found it increasingly difficult to adopt.²³ Further, not all persons in same-sex relationships are seeking radical changes in society and its institution, and many are politically conservative.²⁴ Many of them merely desire acceptance without discrimination and the option to have a legally recognised partnership.²⁵

A further utilitarian argument made after a detailed survey of social science research on the subject is that same-sex and heterosexual relationships do not differ in their essential psychosocial dimensions, that marriage bestows substantial psychological, social, and health benefits and that same-sex couples and their children are likely to benefit in numerous ways from a legal recognition of the relationship as marriage.²⁶ Many same-sex couples wish to marry simply because they are part of a culture in which marriage has long been represented as the ideal institution of connection and commitment and this belief transcends the bounds of sexual orientation. They also believe that the choice of a marital partner is an important personal decision, over which others, particularly the state, should have no control.²⁷ Thus the straightforward argument in favor of same-sex marriage is that if two people want to make a commitment of marriage, they should be permitted to do so, and excluding one class of citizens from the benefits and dignity of that commitment demeans them and insults their dignity.²⁸

²¹ Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1 (2005).

²² Employment Provident Fund Scheme, S. 2(g) (1952). Workmen's Compensation Act, S. 2(d) (1923).

²³ Siddharth Narrain & Birsha Ohdedar, *A legal perspective on Same-Sex Marriage and other Queer relationships in India*, ORINAM, <http://orinam.net/resources-for/law-and-enforcement/same-sex-marriage-in-india/> (last visited May 31, 2014).

²⁴ Brendan O'Neill, *Why gay marriage is a very bad idea*, SPIKED (March 22, 2012) http://www.spiked-online.com/newsite/article/12273#.Ulkj_BZpt2E.

²⁵ Thomas John, *Liberating Marriage: Same-Sex Unions and the Law in India*, in LAW LIKE LOVE 357 (Arvind Narrain & Alok Gupta eds., 2011).

²⁶ Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61(6) AMER. PSYCHO. 607-621 (2006).

²⁷ Mary L. Bonauto, *supra* note 21.

²⁸ Martha Nussbaum, *A Right to Marry? Same-sex Marriage and Constitutional Law*, DISSENT MAGAZINE (2009).

It is pertinent to observe that same-sex marriages are not illegal in India. While Section 377 of the Indian Penal Code criminalises sexual acts between persons of the same sex, it is possible to argue that same-sex marriages are not equal to the performance of such acts.²⁹ Nonetheless the marriage laws in India do not explicitly permit same-sex marriages, and, in fact, reflect a strong heterosexual bias and use terms suggesting only a heterosexual partnership. Moreover, on a realistic note, so long as a provision in a criminal statute such as Section 377 is considered non-discriminatory it would be illogical to seek legal recognition under civil marriage laws.

III. CIVIL UNIONS – A FAIR ALTERNATIVE?

One alternative is to seek the legal recognition of same-sex couples not through marriages but as civil unions or partnerships. Legislations recognising civil unions have been enacted in many states in the United States of America, several Latin American and European countries, Australia and New Zealand.³⁰ Different models of civil unions have been implemented in these jurisdictions. Some states in the United States of America have domestic partnerships that are only recognised by city councils and private companies who extend spousal benefits to the same-sex partners of their employees.³¹ Countries like Germany have conferred only limited legal rights on those entering a civil union. The legal benefits are restricted to laws relating to tax, pensions and adoptions.³² Other models, like that enacted in Vermont following a direction of Supreme Court of Vermont,³³ provide partners with the same legal benefits as those who are joined in marriage.³⁴ The Supreme Courts of Vermont³⁵ and New Jersey³⁶ have held in the recent past that same-sex couples cannot be excluded from the benefits of marriage but the State can decide whether the benefits should be conferred within the framework of a marriage or whether a parallel domestic partnership is to be preferred. Such 'separate but equal' institutions should be in the nature of marriage and should confer the same legal benefits as a marriage.

The advantages of this model are that it faces less opposition, at least on religious grounds and avoids the acrimonious debate as to whether 'marriage' is necessarily heterosexual. It has also functioned as a first step towards recognition of same-sex marriages. In 1999, France enacted a law governing civil

²⁹ Ruth Vanita, *Democratising Marriage: Consent, Custom and the Law*, in LAW LIKE LOVE, 351, (Arvind Narrain & Alok Gupta eds., 2011).

³⁰ NICOLA BARKER, NOT THE MARRYING KIND – A FEMINIST CRITIQUE OF SAME-SEX MARRIAGE 48 (2012).

³¹ *Id.*, at 44.

³² Thomas John, *supra* note 25, at 360.

³³ *Baker v. Vermont*, 744 A 2d 864 (Vt 1999).

³⁴ NICOLA BARKER, *supra* note 30.

³⁵ *Baker*, *supra* note 33.

³⁶ *Lewis v.* 188 NJ 415 : 908 A 2d 196 (NJ 2006).

partnerships and in 2013, it legislated recognition of same-sex marriages.³⁷ Similarly England and Wales recognised civil unions in 2004 but have legislated to recognise same-sex marriages in 2013.³⁸

However, only providing the option of civil unions and excluding marriages for same-sex couples is itself discriminatory, since it provides a class of people only an option that possesses an inherently lower status than marriage.³⁹ Marriage is not merely a contractual relationship that is forged for the partners to gain legal benefits and rights from one another. It has the equally important function of giving both legal and social recognition to a relationship. Status benefits arising from marriage include granting the spouse higher status than other family members and according certain privileges like decision-making powers when the spouse is incapacitated, registration of deaths, etc.⁴⁰ Moreover, two institutions are not necessarily equal because they embody the same legal rights. Marriage, as an institution, has a certain *historical, cultural and social significance* which a civil union does not have. The social status that is conferred by a marriage is as important to same-sex couples as it is to heterosexual couples.⁴¹ It follows that a law that permits same-sex couples to enter only into civil unions, despite giving them the same legal rights, will be treating them differently on the basis of their sexual orientation. It is for these reasons that the Connecticut Supreme Court declared the 'separate but equal' system in the state to be unconstitutional.⁴² Moreover, acceptance of civil unions in place of marriage is tantamount to approval that same-sex relationships are not equal to heterosexual relationships. In the words of Justice Ginsberg of the US Supreme Court, it would mean accepting two kinds of marriage – the 'full marriage' and a sort of 'skim-milk marriage'.⁴³

If a civil union model were to be adopted in India, it would be necessary not only to enact a new law governing civil unions but also amend relevant legislations like the Indian Succession Act, 1925, Guardians and Wards Act, 1890, Workmen's Compensation Act, 1923 and a host of other legislations relating to succession, adoption, pensions etc. so that a partner in a civil union is given the same status as a spouse and considered to be 'family'. On the other hand, legislation, especially on such an issue in which there is likely

³⁷ Angela Charlton, *French President Signs Gay Marriage Into Law*, HUFFINGTON POST (May 18, 2013), http://www.huffingtonpost.com/2013/05/18/french-president-signs-ga_o_n_3298916.html.

³⁸ *Gay Marriage Is Now Legal In England and Wales After 'Historic' Bill Gets Royal Assent*, HUFFINGTON POST (July 17, 2013), http://www.huffingtonpost.co.uk/2013/7/17/gay-marriage-is-now-legal-in-the-uk_n_3610453.html.

³⁹ NICOLA BARKER, *supra* note 30, at 41.

⁴⁰ NICOLA BARKER, *supra* note 30, at 102.

⁴¹ JEFFREY A. REDDING, *QUEER THEORY – LAW, CULTURE AND EMPIRE 125-127* (Robert Leckey & Kim Brooks eds., 2010).

⁴² *Kerrigan v. Commr. of Public Health*, 289 Conn 135 (2008).

⁴³ John Lewis & Stuart Gaffney, *From Skim Milk to Harvey Milk: How Our Community Made History at Last Week's Supreme Court Arguments*, HUFFINGTON POST (May 4, 2013), http://www.huffingtonpost.com/john-lewis/from-skim-milk-to-harvey-_b_3020284.html.

to be vociferous opposition, is likely to be delayed. While it cannot be said to interfere with religious freedoms, it could be opposed on the ground that it provides legislative sanction of non-marital live-in relationships, both heterosexual and homosexual, that is contrary to Indian culture. Thus, even on tactical considerations, seeking legislation recognising civil unions does not seem to be the right course.

IV. SAME-SEX MARRIAGE UNDER PERSONAL LAWS

In India, marriages and weddings have a strong religious and cultural significance as well as social importance. Marriage is considered to be a sacrament and the religious ceremonies are an essential part of the marriage.⁴⁴ This perhaps explains the many instances of lesbian marriages, including performance of religious ceremonies, exchange of garlands in temples or quasi-legal friendship contracts (*maitrikarar*)⁴⁵ in several reported cases. For instance, in 1988, two policewomen married each other in a Hindu ceremony. Though their marriage could not be registered and they were suspended from their jobs, their marriage was accepted and supported by their families and community.⁴⁶ It is interesting that the numerous reported lesbian marriages have been largely between small-town, lower-middle class, non-English speaking women who are not connected to the LGBT movement.⁴⁷

In this milieu, the most satisfactory course would be the recognition of same-sex marriages under Indian personal marriage laws. In India, Christians, Muslims and Hindus have different laws in relation to marriage, succession etc. The Hindu Marriage Act that governs Hindus, Sikhs, Jains and Buddhists states that a marriage may be solemnised between any two Hindus.⁴⁸ It also specifically provides that the bridegroom should have attained the age of twenty one and the bride eighteen.⁴⁹ The Christian Marriage Act provides that the age of the man shall be twenty one and the age of the woman eighteen.⁵⁰ Since Muslim marriages are not governed by a statute, there is no statutory definition of 'marriage', but they are normally considered to be a contract for the purpose of procreation.⁵¹ Thus, all Indian personal laws appear to envisage marriage as only a heterosexual union.

Recognition of same-sex marriages under Hindu personal laws can be obtained by any one of the following approaches: (i) interpreting the existing

⁴⁴ B.N. Sampath, *Hindu Marriage as a Samskara: A resolvable conundrum*, 3(3) J. IND. L. INST. 319-331 (1991).

⁴⁵ ARVIND NARRAIN, QUEER – DESPISED SEXUALITY, LAW AND SOCIAL CHANGE 79 (2004).

⁴⁶ Somak Ghoshal, *The Well of Loneliness*, THE TELEGRAPH, November 25, 2008.

⁴⁷ Ruth Vanita, *Wedding of Two Souls*, 20(2) J. FEMINIST STUD. REL. (2004).

⁴⁸ Hindu Marriage Act, 1955, S. 5.

⁴⁹ *Id.*

⁵⁰ Christian Marriage Act, 1872, S. 60.

⁵¹ Siddharth Narrain & Birsha Ohdedar, *supra* note 23.

law to permit same-sex marriages, (ii) interpreting that the LGBT community constitutes a separate community, the customs of which permit same-sex marriages, (iii) reading down the Hindu Marriage Act, 1956 ('Act') to allow same-sex relationships, on the ground that it would otherwise be rendered unconstitutional, or (iv) amending the Act to permit same-sex relationships.

Since the Act is gender neutral except in the use of the terms *bride* and *bridegroom*, it is possible to argue that same-sex couples can get their marriages solemnised under the Act provided one of them is characterised as the bride and the other as the groom. This approach has been tried by lesbian couples, where one partner presented herself as the bride and the other as the bridegroom.⁵² It is difficult to support this argument by the rules of statutory interpretation, since it strains the words of the statutes and is contrary to the common understanding of the terms *bride* and *groom*. The interpretation also tries to homogenise same-sex unions with traditional forms of marriage. At a time when relationships between heterosexual spouses are being re-fashioned to make them more equal, this interpretation will reinforce traditional oppressive gender stereotypes that genders are inherently different, that two persons in a marriage have pre-set roles and that even same-sex couples have to accept traditional roles in order to get married.⁵³

Another approach would be to obtain recognition of the LGBT community as a community of its own that has its own customs and practices. The Arya Samaj and the anti-Brahmin Self-Respect movement in Tamil Nadu formulated their own marriage rituals and practices.⁵⁴ While the Arya Samaj drew upon the Hindu scriptures in its marriage ceremony, the Self Respect marriages did not do so. But both these forms of marriages got recognition when the Act was amended in Tamil Nadu by inserting Section 7-A to recognise Self-Respect marriages.⁵⁵ The LGBT community could agree on a common marriage practice and seek recognition under the Act. But the difficulty is that members of the LGBT community are governed by different personal laws and follow different customs and practices. Unlike the Arya Samaj is or the followers of the anti-Brahmin movement, they are not united by a desire to bring about specific reforms in Hindu marriage ceremonies.

The third approach would be to demand reading down of the provisions in the legislation governing Hindu and Christian marriage laws by the judiciary so that same-sex marriages are recognised, on the ground that a reading of these laws as prohibiting such marriages, would render the relevant provisions unconstitutional by discriminating on the basis of sexual orientation. While this approach was supported by the reasoning provided by the Delhi

⁵² Ruth Vanita, *supra* note 29, at 348-350.

⁵³ EVAN GERSTMANN, *SAME-SEX MARRIAGE AND THE CONSTITUTION* 58 (2nd Edn., 2008).

⁵⁴ Ruth Vanita, *supra* note 29, at 344.

⁵⁵ Hindu Marriage Act, 1955, S. 7-A.

High Court in *Naz Foundation*, after *Koushal*, it appears that the courts may not be receptive to such arguments. There is the further impediment of the long-standing decision of the Bombay High Court in *State of Bombay v. Narasu Appa Mali*⁵⁶, holding that personal laws cannot be tested against the touchstone of Fundamental Rights. On a different note, it would be possible to contend that traditional Hindu laws did not proscribe same-sex marriages even though the traditional literature of India has many references to same-sex relationships⁵⁷. The codified personal laws reflect a more recent trend of proscribing same-sex relationships that emerged in the colonial era, under the influence of Victorian ideals of heterosexuality and monogamy.⁵⁸ But even on tendering such logic, it may be difficult to convince courts to interfere in personal laws on grounds of discrimination.

The difficulties in these three approaches apply equally to all personal laws. Since none of the above approaches seems feasible, the final course would be to seek statutory amendments to the personal laws. This most satisfactory solution would perhaps also be the most difficult to achieve in practice. Such an amendment would be highly controversial because of hostility towards the LGBT community by a vocal section of society. Moreover, it would be perceived as interference in the practices and customs of religious groups. Such a controversial legislative move will not be the priority of the government even if it were to be in favour of such a measure. As a case in point, when *Koushal* was being heard, the Attorney General informed the court that the Government of India was not seeking a reversal of *Naz Foundation*,⁵⁹ but after *Koushal*, the Government did not initiate any move to repeal section 377. Further the Bharatiya Janata Party has unequivocally supported *Koushal*.⁶⁰ For these reasons, it appears that the time is not ripe to push for legislative change.

V. SAME-SEX MARRIAGES UNDER THE SPECIAL MARRIAGES ACT

An option which ought not to raise religious hackles is to seek an amendment to the Special Marriage Act, 1954 ('SMA') to permit same-sex marriages. The SMA is a secular legislation that facilitates marriages between people of different religions or those who do not wish to be bound by their personal laws. Instead of a religious ceremony, a Marriage Officer registers

⁵⁶ (1951) 53 BOM LR 779.

⁵⁷ Ruth Vanita, *Homosexuality and Hinduism*, GAY AND LESBIAN VAISHNAVA ASSOCIATION, <http://www.galva108.org/hinduism.html> (last visited May 31, 2014).

⁵⁸ Ruth Vanita, *supra* note 47.

⁵⁹ Goolam E. Vahanvati, *Law can't remain static: Government told SC that Section 377 didn't reflect Indian values*, TIMES OF INDIA (December 13, 2013), http://articles.timesofindia.india-times.com/2013-12-13/edit-page/45124053_1_delhi-high-court-supreme-court-judgment.

⁶⁰ *BJP will not support "unnatural" homosexuality: Rajnath Singh*, FIRST POST (December 15, 2013), <http://www.firstpost.com/politics/bjp-will-not-support-unnatural-homosexuality-rajnath-singh-1286933.html>.

the marriage.⁶¹ In its existing form, the SMA seems to apply to heterosexual couples, since it provides that the *male* should have attained the age of twenty-one years and the *female* the age of eighteen years.⁶² But it is not difficult to accommodate same-sex marriages within the framework of SMA. It would only be necessary to amend Section 4(c) so that it reads that a party, *if* male, should have attained the age of twenty-one years and *if* female, should have attained the age of eighteen years and to add a specific provision that same-sex marriages are permitted. In any case, even if personal laws are amended to recognise same-sex marriages, the SMA would have to be amended to accord the same recognition to relationships between persons belonging to different religions.

While an amendment is clearly the best legislative option, it is one that might be difficult after the recent formation of a BJP government. While the Congress and the CPI(M) both included decriminalisation in their manifestos for the Lok Sabha elections, the BJP was clear in its support of the judgment – a party leader commenting that homosexuality is an unnatural act that cannot be supported.⁶³ More recently, the Rashtriya Swayamsevak Sangh, the BJP's ideological parent, has stated that while they are against glorifying homosexual behaviour, it is debatable whether it should be criminalised.⁶⁴

While the change in question is easy to draft and cannot be said to interfere with religious freedoms, it is bound to generate vocal opposition. The amendment to the SMA would be similar to the laws permitting same-sex marriages enacted in other countries. Today, sixteen countries have enacted such laws starting from the Netherlands in 2000 to England and Wales in 2013.⁶⁵ Similarly, thirteen states in the USA have passed laws permitting same-sex marriages. But there are several anti-same-sex enactments as well. The US Congress enacted the Defence of Marriage Act 1996 ('DOMA') to deny federal benefits to same-sex couples married under State laws. While DOMA was struck down by the US Supreme Court⁶⁶, the challenge to DOMA in the Supreme Court was vigorously defended by Republican groups, though the Obama Administration did not support the Act.⁶⁷

⁶¹ Thomas John, *supra* note 25, at 359.

⁶² The Special Marriage Act, 1954, S. 4(c).

⁶³ *SC verdict on Sec 377: Why is BJP on the wrong side of history?*, FIRST POST (December 15, 2013), <http://www.firstpost.com/india/sc-verdict-on-sec-377-why-is-bjp-on-the-wrong-side-of-history-1286931.html>.

⁶⁴ Ananhit Mukherjee, *Gay sex: RSS comment sparks hope on Section 377*, THE TIMES OF INDIA (28-5-2014), <http://timesofindia.indiatimes.com/India/Gay-sex-RSS-comment-sparks-hope-on-Section-377/articleshow/35644859.cms>.

⁶⁵ *Freedom to Marry Internationally*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/landscape/entry/c/international> (last visited May 31, 2014).

⁶⁶ *United States v. Windsor*, 185 L Ed 2d 570 (2013).

⁶⁷ Chris McGreal, *Gay marriage debate: Supreme Court indicates cautious approach*, THE GUARDIAN (March 27, 2013), <http://www.guardian.co.uk/world/2013/mar/26/supreme-court-gay-marriage-hearing>.

But such actions produce a political backlash, varying across areas. Legalising gay marriage in states like Massachusetts generated little political opposition since the majority of residents were in support of it. However, the backlash in Ohio relating to a judgment in favour of gay marriage was extremely strong. The Republican Candidate – George Bush – had a double-digit increase in the percentage of votes by groups that disproportionately opposed gay marriage – the religious, the elderly, working class and African Americans.⁶⁸ Thus, even in a country like the United States of America, where the battle for LGBT rights has been fought tenaciously over several decades, there is a strong opposition to recognising same-sex marriages. An even greater backlash is highly probable in India, especially considering that it is a country that has currently failed to even decriminalise homosexual acts.

VI. READING DOWN OF SPECIAL MARRIAGES ACT

The final option is to seek a judicial ruling that the SMA has to be read as permitting same-sex marriages on the ground that otherwise it would be discriminatory against same-sex couples and hence unconstitutional. There are several international precedents in support of this proposition. Three State Supreme Courts in the United States, those of Massachusetts,⁶⁹ Connecticut⁷⁰ and Iowa⁷¹ have held that a marriage law that did not permit same-sex couples to marry was unconstitutional. All three courts invoked both due process and equal protection clauses and pointed out that the right to marry is an individual liberty right that also involves an equality component. A group of people cannot be denied the right of marriage granted to others, without a very strong justification, which, the court held, did not exist.

The majority view of the US Supreme Court in striking down DOMA did not hold that same-sex marriages were a constitutional right.⁷² It largely based its decisions on the Constitutional structure that grants the States authority over the definition of marriage. But as pointed out by Justice Scalia in the dissenting judgement, the majority view paves the way for a claim that same-sex marriages are a constitutional right. If DOMA unconstitutionally robbed same-sex couples of “personhood and dignity” in states that permitted the practice, he said, quoting from the majority opinion, courts might find that laws in anti-gay-marriage states also must fall. Indeed, after the Supreme Court decision, a Superior Court of New Jersey held that the state government

⁶⁸ MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2012).

⁶⁹ *Goodridge v. Deptt. of Public Health*, 798 NE 2d 941 (Mass 2003).

⁷⁰ *Kerrigan v. Commr. of Public Health*, 289 Conn 135 (2008).

⁷¹ *Varnum v. Brien*, 763 NW 2d 862 (Iowa 2009).

⁷² *United States v. Windsor*, *supra* note 66.

was violating New Jersey's Constitution by denying federal benefits to same-sex couples by not allowing them marry.⁷³

The Constitutional Court of South Africa has held⁷⁴ that marriage laws that did not permit same-sex marriages were violative of Section 9(3) of the Constitution, which states: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

There are also several Canadian decisions beginning from a decision of the Court of Appeal for Ontario⁷⁵ that held that the existing common law definition of marriage to the extent that it referred to "one man and one woman" violated the equality rights of same-sex couples under Section 5 (1) of the *Canadian Charter of Rights and Freedoms* and that reformulated the definition as "the voluntary union for life of *two persons* to the exclusion of all others".

On the other hand, a High Court in England did not accept that not permitting same-sex marriages violated the European Convention on Human Rights.⁷⁶ The Court distinguished the decision of the Constitutional Court of South Africa by, among other things, pointing out that in South Africa there was no statutory provision such as the Civil Partnership Act of the United Kingdom, which recognised, on a basis of broad equivalence, the status of a long term same-sex relationship. Even the Supreme Court of Vermont had held that the State can decide whether recognition should be conferred within the framework of a marriage or a parallel domestic partnership.⁷⁷

After *Naz Foundation*, this option appeared very promising. The decision had emphasised that Article 15 of the Constitution conferred personal autonomy on all individuals and prohibited discrimination on the basis of religion, race, caste, sex and place of birth. The Court had recognised that a common thread runs through these – they are either immutable characteristics or entail a fundamental choice. It further provided that analogous grounds that can potentially be used to impair personal autonomy also have to stand the test of strict scrutiny in court. The *Naz Foundation* court opined that sex as a ground includes within it sexual orientation since "*discrimination on the basis of orientation is grounded in stereotypical judgments and generalisations about the*

⁷³ *Garden State Equality v. Dow*, 2012 NJ Super Unpub LEXIS 360.

⁷⁴ *Minister of Home Affairs v. Fourie*, (2006) 1 SA 524 (CC).

⁷⁵ *Halpern v. AG of Canada*, (2003) 169 OAC 172.

⁷⁶ *Wilkinson v. Kitzinger*, 2006 EWHC 2022 (Fam).

⁷⁷ *Baker v. Vermont*, 744 A 2d 864 (Vt 1999).

*conduct of either sex.*⁷⁸ The decision also cited several foreign precedents in support of these propositions. It is thus clear that a powerful argument could have been developed that if the Special Marriages Act, a secular legislation, only permitted marriage between couples belonging to different sexes, it would be discriminating against same-sex couples on the basis of sexual orientation and that such discrimination would be in violation of Article 15 and hence unconstitutional. The Court could thus have been urged to read down the relevant provisions to permit same-sex couples to marry under the SMA.

Koushal poses great difficulty to this approach. *Koushal* can be cited to argue that there is a presumption that SMA is constitutional. In fact, the argument would have greater force since SMA was enacted after the Constitution came into force. The High Court relied on numerous judgments from other jurisdictions in *Naz Foundation* in support of its decision. The Supreme Court in *Koushal*, said that such foreign judgments might be informative but could not be applied to determine the constitutionality of a law enacted by the Indian legislature.⁷⁹ Finally, there is the fact that the Court has stated that such matters should be handled by the competent legislature. As pointed out earlier, most of these principles no longer apply indisputably after *NALSA*. But realistically it is only when *Koushal* is overruled that a reading down of the SMA to allow same-sex marriages can be expected.

However, even many of those who support the above legal and constitutional principles and accept the above tactical reasoning, would wonder if Courts should be approached rather than democratically elected bodies. But as Martha Nussbaum has pointed out, it is reasonable that courts have a legitimate role to play in this divisive area, standing up for minorities who are at risk in the majoritarian political process.⁸⁰ The dismissive observations of the Court regarding a 'miniscule minority' is uncharacteristic of Indian courts and *Koushal* is an aberration in this regard. It must be remembered that even the short-term de-criminalisation of homosexual acts came rather late to India and was not achieved by legislative action but by the judiciary performing its duty of upholding constitutional rights.

VII. CONCLUSION

It is clear that the anti-discriminatory initiative of *Naz Foundation* has to be built on to obtain legal and social recognition of long term same-sex relationships through marriages simultaneously with the efforts to overturn *Koushal*. There is no advantage in going through the half-way house of civil unions as was done in the West. The challenge of obtaining legislative

⁷⁸ Tarunabh Khaitan, *Reading Swaraj into Article 15 – A New Deal for All Minorities*, in *LAW LIKE LOVE* 281-283 (Arvind Narrain & Alok Gupta eds., 2011).

⁷⁹ *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1 at para 52.

⁸⁰ Martha Nussbaum, *supra* note 28.

sanction through a civil union is just as severe as that of obtaining sanction via same-sex marriages. It is clear that denial of the choice of marriage to same-sex couples further reinforces discrimination by treating them differently. In a society that gives marriage such religious significance, the most satisfactory course would be the enablement of same-sex marriages under the personal laws. However, it would be an uphill task to seek amendments to the personal laws of all religions. Any judicial intervention in this regard would be perceived as interference in religious freedom. In this scenario, the most viable option appears to be legislative amendments to the SMA to include same-sex marriages. The protests and debate relating to similar legislations in the United States serve to illustrate that an amendment in India would also invite vigorous opposition. Despite apprehension of such public outcry, when the rights of a class of citizens are denied by reason of a majoritarian norm, an approach to the judiciary is just as right an approach as seeking legislation from the Parliament. If *Koushal* were to be overturned, it is very likely that the principle laid down in *Naz Foundation* that the prohibition of discrimination by Article 15 on the basis of sex includes a bar on discrimination on the basis of sexual orientation will be affirmed. This and international precedents could be used to mount a constitutional challenge to the SMA as being discriminatory on the basis of sexual orientation and seek a reading of the Act to the extent of permitting same-sex marriage.