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Marriage Equality Judgment: The Missing Case of International Covenants

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Could internationally recognised principles of human rights have informed a better judgment in the marriage equality case?

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ON October 17, 2023, a five-judge Constitution Bench of the Supreme Court of India delivered the much-awaited judgment on marriage equality.

While the petitioners had assailed the constitutional validity of certain provisions of the Special Marriage Act, 1954 and a few other laws, the main question before the court was whether LGBTQI+ persons have a right to marry.

This necessitated the court to frame a preliminary question as to whether there was a fundamental right to marry under the Indian Constitution.

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There were numerous precedents before the court to affirm the fundamental right to choose one's partner, but none of them categorically grants the right to marry. While this case presented the opportunity to state the obvious, the court shocked everyone by unanimously holding that there is no fundamental right to marry under the Indian Constitution.

In doing so, the Chief Justice of India Dr D.Y. Chandrachud reasoned that "*while marriage is not fundamental in itself, it may have attained significance because of the benefits which are realised through regulation.*"

Justice S. Ravindra Bhat, with whom Justice Hima Kholi concurred, denied marriage the status of a fundamental right on the ground that the "*importance of something to an individual does not* per se *justify considering it a fundamental right, even if that preference enjoys popular acceptance or support.*"

The ratio of the case in holding that the right to marry is not fundamental now runs contrary to the accepted position of the right to marry as a human right under international human rights law.

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It may be worth recalling Article 16(1) of the Universal Declaration of Human Rights: "*Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.*"; and Article 23(2) of the International Covenant on Civil and Political Rights that affirms that "*the right of men and women of marriageable age to marry and to found a family shall be recognised.*"

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It is surprising to find that none of the judges have engaged with the legal position of marriage under international human rights treaties and conventions. While the court, beginning with *Kesavananda Bharati versus State of Kerala* had applied the norms of international laws and, in particular, customary international law and international covenants to interpret domestic legislation, there is no whisper of any international covenant in the judgment on such a crucial issue.

The court has used international norms to interpret statutory provisions and to identify unenumerated fundamental rights. Pertinently, in *Vishaka versus State of Rajasthan*, the court held, "*Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.*"

It may also be worth noting that the court, in the early 1990s, relied upon both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) to construct a fundamental right to health under Article 21 in *CESC Ltd versus Subhash Chandra Bose* and *Consumer Education & Research Centre versus Union of India*.

Also read: On the eve of the marriage equality judgment, a quick recap

Paradoxically, the CJI does not engage with the UDHR and the ICCPR while deciding on the nature of the right to marry. However, in the latter part of his opinion, he relies on the provisions of these very international covenants to prohibit "*conversion therapies*" or other "*treatments*" which are

aimed at altering sexual orientation as they constitute "*cruel, inhuman and degrading punishment*" within the purview of Article 5 of the UDHR and Article 7 of the ICCPR. This selective use of international norms to suit one's convenience does not bode well for the rule of law.

It is, therefore, submitted that the Supreme Court, by ignoring its own principles of construing fundamental rights in light of binding international norms, has fundamentally erred in holding that there is no fundamental right to marry.

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