



JUDGMENT REVIEW

Understanding the US Supreme Court’s Controversial Decision overturning *Roe v Wade*

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In a 6-3 Conservative majority decision, the Supreme Court of the United States has recently overturned almost the 50-year-old landmark abortion decision *Roe v Wade* (1973). Earlier to the recent decision, women’s right to abortion was a constitutionally protected right; but now it is no longer a constitutional right, and hence, the authority to outlaw or allow the right to abortion returns to the individual state legislature. To understand the decision and its reasoning, we have to first understand the politics of constitutional interpretation in the US.

There are two contrasting leading theories of constitutional interpretation relevant to the case: one is ‘originalism’ and the other one is ‘living constitutionalism’. Originalism is the antithesis to living constitution. Originalists believe that the constitutional provision means what the original understanding of the text at the time it was drafted and ratified, meant. According to this theory, constitutional provisions do not change its meaning over time. If the constitution needs any change to meet the needs of the time, it can only be so done by the amendment.

On the other hand, living constitution is the idea that the constitution is a

document that evolves, changes over time from decade to decade and adapts to new circumstances without being formally amended. This theory is of the view that the amendment procedures of the constitution is so rigid that it would be unrealistic to expect cumbersome amendment process to keep up with the changed circumstances which were unforeseeable when the constitution was in fact adopted.

Prior to the *Roe v Wade* decision, it was up to the states to allow, restrict or ban women’s right to abortion. Back then abortion was prohibited in almost 30 states of the US. Thus, the effect of the decision significantly affected the individual states’ prerogatives to regulate abortion in the manner as their citizens wanted it to be.

Since then, *Roe v Wade* has always been one of the controversial decisions of American constitutional law history. The conservative justices regarded *Roe* as a bad decision which illegally usurped to the field of parliament. According to them, abortion is a policy question and the democratically elected representatives should be allowed to do their job on the subject-matter. All issues not addressed by the constitution should be decided by the people, by the state legislatures.

On the contrary, under the living

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constitutionalism theory, the 14th amendment protection of liberty, as liberals opine, includes a fundamental right to privacy that protects an implicit right to abortion and abortion is covered under constitutional right to privacy.

Now the Supreme Court of super majority conservative judges returns to the position from the pre-*Roe v Wade* (1973) context. Conservative Justice Samuel Alito writing for the majority expressly reflected jurisprudence of

originalism saying ‘the constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision’.

He went on adamantly holding ‘abortion couldn’t be constitutionally protected. Until the latter part of the 20th century, such a right was entirely unknown in American law. It is time to heed the constitution and return the issue to the people’s elected representatives.’

Living constitution theory, generally speaking, from which judgements like *Roe v Wade* flows from is enormously attractive to judges and its supporters (vast number of American citizens) because it empowers both of them. Judges are empowered to re-write their philosophy into the constitution in the guise of interpretation and similarly thereby their supporters’ views become binding even upon the large number of people who do not support the theory. On the other hand, originalism leaves the questions like abortion right, death penalty, same sex marriage to be decided by the people through legislature whereas living constitution theory imposes the rule not explicitly in the constitution even upon the persons who are against such exercise.

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RIGHTS ADVOCACY

Implications of amending the legal definition of ‘children’

LAW DESK

Recent incidents of violence by students and the increase of “teen gangs” have brought to the forefront talks on amending the definition of “children” in the existing laws in order to bring teenagers and adolescents within the scope of punishment. Rights activists have responded to the proposal for such change by bringing attention to Bangladesh’s commitments to international human rights instruments which affirm the definition of “children” as including all those under the age of 18 years. Article 1 of the UN Convention on the Rights of Child – to which Bangladesh is a party – confirms this position.

The Children Act, 2013 regulates the matters of trial in which the accused is a child (defined in section 4 of the Act as a person below 18 years of age) and provides for the procedure to be followed during trial and detention in relation to the “children in conflict with the law”. These provisions require cases in which the accused is below 18 years of age to be tried before the Children Court and provides for various procedural safeguards for the accused child. Sections 33 and 34 of the 2013 Act provide safeguards with regard to sentencing.



Section 33 states that children cannot be sentenced to death, or life imprisonment. Children may be sentenced to imprisonment only to the extent allowable, and if the requirements set forth in section 33 are met. Section 34 provides that if a child is found guilty of an offence punishable with death or life imprisonment, he/she may be sentenced to detention in the “Child Development Center” for up to 10 years. For any other offence, a child may be detained in the “Child Development Center” for up to 3 years.

A change in the definition of the child which reduces the age of children from 18 years would exclude those falling outside the definition, from the aforementioned safeguards. There would be no legal limits to the legal punishments to which these teenagers can be sentenced, and no protection as to the conditions in which they would be detained in prisons. As it is, there are concerns regarding the environment of the Child Development Centers, and complaints of mistreatment of children within such facilities. Under the 2013 Act, there are provisions on keeping children separate from adult prisoners if a child is sentenced to imprisonment. This would also be undone if children of particular age groups are removed from the definition of children.

The existing global approach to juvenile justice system is one focused on rehabilitation, reintegration into the mainstream, and prevention of future criminality, and the proposal to amend the definition would have serious impacts on ensuring these aims. Any amendment without due attention to the nature and motivation behind the recent criminality in adolescent groups may not be the most prudent or effective.

LAW IN DEPTH

Mitigating Inland Maritime Incidents with Law

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In the last two decades, the inland maritime accidents have accelerated in the country and over six thousand people have lost their lives, were injured, or went missing in such accidents. By the beginning of 2022, several accidents have already occurred and over 50 people have lost their lives.

Chapter IV (sections 44-53) of the Inland Shipping Ordinance, 1976 deals with shipping casualties. Under section 44(2), the master or the crew has the responsibility to report if any casualty occurs in the voyage. However, in recent marine disasters, the master and the crew tend to be the first ones to escape from the liability of the accident by escaping the vessels.

Offences concerning inland marine accidents are to be tried under section 46 which provides that the Government may direct the District Magistrate or the Upazilla Nirbahi Officer to hold the inquiry. Additionally, the Court of the Magistrate of the First Class has jurisdiction where the casualty has happened. Section 47 provides for the constitution of the Marine Court to try the punishable offences under the Ordinance.

Additionally, under section 54B, if any vessel carries more than one hundred passengers, it shall require telecommunication equipment to operate

the vessel. Most inland vessels lack telecommunication devices and safety equipment. From the reports of several incidents that took place last year, the vessels were overcrowded and not having proper safeguard mechanisms installed in the vessels to deal with the accidents.

As reported, the primary reason for the accidents is the overcrowding of inland passenger vessels such as launch or ferry. The lack of skills of the masters of the vessel and proper training to operate the inland vessels, draw the risk of incidents.

Another problem in launch capsizing is that the victims do not get proper compensation. While the master responsible is liable under section 65, victim support or victim compensation is not addressed in existing legislation. Not having proper embedded legislation is a challenge to get access to justice for the victims. There are no proper victim financial support funds in the

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existing legislation either.

According to some peer-reviewed papers, there is no database for inland vessel accidents. This prevents illustrating the exact scenario of the incidents.

Though the 1976 Ordinance requires the proper training of the masters to be ensured, in reality, most of the masters do not have sufficient training. Without the proper knowledge on the safety of life at sea or about preventing collisions at sea, the collisions occur and the safety of the passengers is compromised during the

occurrence of the collision.

Additionally, every inland vessel especially passenger-carrying vessel should have safety features. The ballast of the vessel should be in good condition during departure and arrival and the Master of the vessel should keep eye on the load-lines. According to various peer-reviewed research papers, due to the overloading of the passengers, the vessels lost their stability and accidents happened.

Though the 1976 Ordinance has

mentioned that, an inland vessel cannot proceed to voyage without ensuring the fire safety features, in reality, it is hardly maintained by the authority.

However, there is no provision mentioning smoke detectors in the legislation. Analysing the incident, the smoke of the vessel is often ignored by the crew and the master of the vessel and as a result, the incident becomes an unavoidable consequence. The engine rooms are situated beside the kitchen or lower deck of the vessel, and due to this, combustible substances from the kitchen easily cause a fire in the engine room.

At present, there are 12,959 registered inland vessels, among them, 839 are passenger-carrying vessels according to the Department of Shipping. However, there is no concrete data regarding the unregistered vessels.

Perusing the recent incidents, expired licenses of vessels concerning engines, lack of proper safety features, not having insurance licenses are the primary cause of the incidents.

Though the 1976 Ordinance has some preventive provisions to safeguard the passengers from the incidents, the lack of strong enforcement of the law has paved the way for the offenders to commit the offence. Therefore, the existing legislation needs to be amended to safeguard the passengers from unfortunate incidents in near future.

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