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Research Article

Deriving Rights from the Penumbra: Landmark Cases of the Supreme Court of Nepal

Swechhya Sangroula
Assistant Professor, Kathmandu School of Law

Article Info.

Corresponding Author
Swechhya Sangroula

Email
swechhya.s@gmail.com

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Orcid
https://orcid.org/0009-0009-2802-4446

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Abstract

This article explores how courts derive implicit rights from explicit ones through judicial interpretation. Constitutions enumerate fundamental rights and liberties, but the language of the law, as a social construct, can often be vague. Utilizing the conceptual framework of the penumbra from *Griswold v. Connecticut and HLA* Hart's core and penumbra theory, this article delves into the methods of judicial reasoning employed to derive implicit rights. Starting with a general outline of the penumbra concept, the study applies it to landmark cases from Nepal, where courts have derived implicit rights, and juxtaposes these with cases where no such derivations were made. The focus is on the method of judicial reasoning rather than an appraisal of the case outcomes. The key argument is that judges justify the derived implicit rights as inherent to explicit guarantees, rather than taking credit as "norm entrepreneurs." Judges support their reasoning by appealing to a broader constitutional vision, emphasizing the inherence of implicit rights arising from a confluence of multiple rights, and broadly deferring to an international normative regime. The conclusion highlights that subsequent constitutional developments often transform implicit rights into explicit ones, reflecting a logical and systematic judicial approach that enhances the protection and clarity of fundamental rights. This systematic approach underscores the dynamic nature of constitutional law, where implicit rights are not static but evolve into explicit rights, thus progressively broadening the scope of protected fundamental rights and ensuring their effective implementation within the legal framework.

Keywords: judicial interpretation, penumbra, judiciary, rights

Introduction

In *Griswold v. Connecticut* (1965), the United States Supreme Court faced the challenge of addressing the constitutionality of a Connecticut statute that prohibited any person from using any drug, medical device, or other instrument for contraception. The issue before the Court was whether the American Constitution protects the right of privacy of married couples to be counseled in the use of contraceptives against the state's statutory regulation. In a 7-2 decision, the Court declared null and void the Connecticut statute, stating that the Constitution protects the right to privacy against state restrictions.

In 1995, a writ petition was filed in the Supreme Court of Nepal seeking to cease the

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activities of the Godavari Marbles Company Pvt. Ltd (*Surya Prasad Sharma Dhungel v. Godavari Marble Industries, 1995*). The petition claimed that the polluting activities of the industry degraded the environment and, consequently, violated the right to life of persons living in proximity of the Industry. The issue before the Court was whether the Constitution of 1990 guaranteed a right to a clean environment within the right to life. The Court concluded that a right to a clean environment was "inherent" in the right to life and issued directives to enact necessary legislation to protect the environment.

Separated by time and space, these two cases have been considered "landmark" in their ex-post analyses. A comparable commonality in both *Griswold & Godavari Marbles* cases is how the Court derived an implicit right from a constitutionally guaranteed explicit right. The American Constitution, relatively concise and short, does not explicitly protect a general right to privacy. The 1990 Constitution of Nepal had no right to a clean environment guaranteed expressly as a fundamental right. Yet, in both these cases, the Court derived from an explicit right an implicit right using a method of reasoning. For consistency, I choose 'derive' and "derivation" to describe this method of judges in the article. Further, as shall be seen in the succeeding paragraphs, judges often do not describe their process as one involving the creation of a new right—they stress, in variant language, that the right already existed within the explicitly guaranteed right.

The purpose of the article is rather straightforward—it explores select cases from the Supreme Court of Nepal that represent the derivation mentioned above of an implicit right and where the petitioner specifically sought such a derivation; then, it describes the method of derivation by parsing the justificatory reasoning offered by the Court. It is beyond the scope of the article to evaluate whether such a derivation was reasonable—a worthy project, nevertheless. Instead, the article helps give a general picture of how a Court justifies its derivation and leaves the judgment to the readers. In sum, the article tackles the question: how does the Court justify its reasoning when it derives an implicit right, or does not, from an explicit constitutional right?

I have employed a descriptive study design using a doctrinal method to read, in detail, selected cases from the Supreme Court. As a conceptual framework, I have relied on the doctrine of "penumbra" and "penumbral right" from Griswold and the Hart-Fuller debate in jurisprudence. Had the article proceeded without engaging the concept of penumbra (it would be possible to do so), it would have missed a broader jurisprudential context to understand the reasoning behind derivation rights. The cases selected for the study do not refer to the concept of penumbra specifically—sometimes, hitting at something vaguely similar on some occasions. In light of that, the conceptual framework can be a unifying lens to view disparate cases. I have chosen most of the cases from the "landmark" compendium of cases produced by the National Judicial Academy (NJA) on various themes (National Judicial Academy, 2010; National Judicial Academy, 2020). Among the cases cited, I purposively chose cases in which a derivation of an implicit right was a legal issue. I chose cases where, say," a standalone related right, was derived (for example, right to clean environment from a right to live) or was petitioned from the Court. Aware of a possible selection bias, in the interest of keeping the article within permissible limits, I have chosen emblematic cases only; they are not exhaustive.

The cases I have selected for study are widely reported and widely consumed (because most of them were selected and included in the "landmark" compendium of the NJA and edited by a judge of the Supreme Court). Most readers may be familiar with the ins and outs of the cases due to their broad reach and publicity. In that sense, the article does not claim to *do* anything new. Humbly, I must accept that the article does bring them together to pontificate not on the substance or the outcome but rather on the process through which they were reached in the background of the conceptual framework of a penumbra.

As with most human-rights-based "landmark" cases, the outcome (the result of the decision) often eclipses the reasoning process. One may celebrate an outcome despite feeling lukewarm about the method employed (a classic case of consequentialism) or vice-versa. The Griswold case is an apt example. Reynolds (1992) admitted that the Conservatives criticized Griswold, and even the Liberals who celebrated the decision were "more comfortable" with the outcome than the reasoning method of Douglas (p. 1336). Therefore, even celebrated landmark cases are worth revisiting, in greater detail, for their reasoning process. From the article, I hope the readers get a generic primer on this process.

To do so, first, I shall lay out the theoretical concept of the penumbra and its basis in legal jurisprudence. Then, I shall discuss generally how the penumbra has been used in deriving rights in other jurisdictions to extract the process of reasoning. Finally, I shall study select cases from the Supreme Court of Nepal in light of the conceptual framework and make some concluding observations.

Penumbra in Law

In *Griswold v. Connecticut,* Justice Douglas (writing for the majority) found a right of privacy in the American Constitution, despite not being guaranteed specifically. He concluded: "The foregoing cases suggest that specific guarantees in the Bill of Rights have *penumbras* [emphasis added], formed by emanations from those guarantees that help give them life and substance ... Various guarantees create zones of privacy." (Griswold, 1965, p. 484). Then, Douglas addressed the various "controversies" over these penumbral rights of "privacy and repose" that appeared in earlier cases. Citing a range of earlier cases, Douglas then writes that "these cases bear witness that the right of privacy which presses for recognition here is a legitimate one" (Griswold, 1965, p. 485).

Dissenting with the decision, Justice Black expresses that the Connecticut law is constitutional. He explains:

> I do not to any extent whatever base my view that this Connecticut law is constitutional on a belief that the law is wise or that its policy is a good one. In order that there may be no room at all to doubt why I vote as I do, I feel constrained to add that the law is every bit as offensive to me as it is to my Brethren of the majority…who, reciting reasons why it is offensive to them, hold it unconstitutional. (Griswold, 1965, p. 507)

Justice Black first begins by sharing his distaste for the Connecticut statute. Then, based on the facts of the case, he explains why he does not want to "stretch" the Amendment (p. 507). Cautioning against a "liberal reading" of the Bill of Rights provision, Black elaborates:

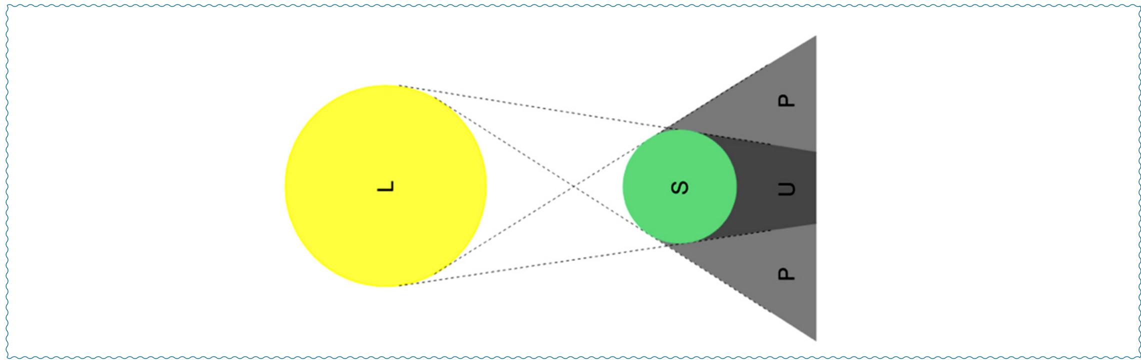
> The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not …. One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning…I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some *specific* [emphasis added] constitutional provision. (p. 510)

Credited with popularizing the term "penumbra," Justice Douglas does not define or elaborate on the term in the decision but that they are "formed by emanations" from specific guarantees. Douglas found emanations in not only a single constitutional provision but multiple--such as the First, Third, Fourth, Fifth, and Ninth Amendments (each dealing with a different subject matter). From these, Douglas extracted a "common idea"—to protect against the Government's purported intrusion on people's private lives and intimate relationships (Reynolds, 1992, pp. 1335-1336).

In astronomy, penumbra (etymology: from Latin paene, "almost"; umbra, "shadow") refers to "the outer part of a conical shadow cast by a celestial body, in which the light from the source is partially blocked—as compared to the umbra, the shadow's darkest, central part, where the light is totally excluded" (Britannica, 2023).

Figure 1

Penumbra and Umbra



Note. (L) Light Source (S) Subject (P) Penumbra (U) Umbra. From Snaily. (2007) CC BY-SA 3.0 <http://creativecommons.org/licenses/by-sa/3.0/>, via Wikimedia Commons

As a "metaphor," in law, penumbra denotes a right or rights implied that is not explicitly guaranteed—a term more widely used in American constitutional law (Henly, 1987). In his study of the earliest usage of the term, although contested, Henly (1987) attributed the usage to Oliver Wendell Holmes, dating as far back as 1873 (p. 81). In a scholarly piece in 1873, Holmes had exhorted that "... it is better to have a line drawn somewhere in the penumbra between darkness and light, that to remain in uncertainty", approaching the question of the evolution of law (Holmes, 1873, as cited in, Henly, 1987).

Griswold popularized the usage of penumbra as a metaphor in judicial reasoning, even though "penumbra" had been used by judges in their opinions, here and there (for instance, *Olmstead v. United States,* 1928*; Coleman v. Miller*, 1939). Analyzing Griswold's "method," Reynolds (1992) defines deriving constitutional rights "from sources other than explicit constitutional language" as "reasoning-by-interpolation" and "penumbral reasoning" (pp. 1333-1334). Interpolation is "the insertion of something of a different nature into something else" (Oxford University Press, n.d.). In this article, I subscribe to Reynolds' "penumbral reasoning" to describe the method of derivation of implicit rights and "penumbral right" to describe the implicit right derived (Henly, 1987, p. 83). In the next section, I turn to Hart's theory of core and penumbra to bolster the conceptual framework.

Debates and the "Penumbral Problem"

The debate on how a judge must approach the law's vagueness and the "penumbral problem" has followed us to the present. Judges and jurists disagree about approaching the problem—whether to derive an implicit from the explicit. Let us first explore the famous—Hart-Fuller debate.

In 1958, in the pages of the Harvard Law Review, a debate broke out between Hart, an analytical positivist, and Fuller, a natural legal theorist. Having famously quipped, "the law is the law" (Dyzenhaus, 2008), Hart critiqued the idea of the "indeterminacy" of legal rules (Hart, 1958). Targeting the legal realists, he gave an example of a somewhat determinate rule that reads: "no vehicles in the park." Skeptical of judges and judicial power, Hart's predecessor, Jeremy Bentham, had wanted a precisely written law, with all the details, to render it determinate (Schofield & Harris, 1998). Not a

primary target of Hart's critique, Fuller raised a counter-example: what if people try to "mount on a pedestal" in the park a military truck "in perfect working order" as a war memorial? Would that be prohibited under Hart's no vehicles in the park rule? (Fuller, 1958, p. 663)

In response, Hart admitted that words generally have an "open texture" and differentiated a rule's "core" from its "penumbra" (Hart, 1958, p. 607). Hart borrowed from Bertrand Russell's theory of the core and the fringe (Russell, 1923) and Friedrich Waismann's vagueness and open texture in law (Waismann, 1951; Schauer, 2008, p. 1125). Hart added that when judges interpret the law, to them, the law's core is generally evident and it is only in a "hard case" when there is vagueness and the law runs out, that judges engage in "extralegal" reasoning as an exception (Hart, 1994, as cited in, Schauer, 2008, pp. 1109, 1125). Reasserting the argument that law is not determinate without meditation on its linkage with morality, Fuller concluded that judges must search for the law's "purpose" (Fuller, 1969, as cited in Schauer, 2008, p. 1110).

A hard case is one in which two reasonable interpretive inferences may be drawn. It is in these cases that penumbral reasoning becomes most activated. In short, it seems like either of the inferences can fit. A case in point is one of Riggs v. Palmer (1889) from New York. A grandson murders the grandfather to obtain the property the deceased grandfather had bequeathed him in his will. Having served his criminal penalty for murder, the grandson returns and claims the property willed by the grandfather. The New York's Statute of Wills of 1889, as it was, said anyone named in a will would inherit except in cases of fraud, duress, or incapacity at the time the will was made (Riggs v. Palmer, 1889, as cited in, Schauer, 2008, p. 1118). The issue before the Court is whether, in the absence of a positive prohibition written explicitly in the statute, the grandson, Palmer, is entitled to the property. The majority decided against the grandson. To allow him to "enjoy the fruits of his crime" would be "a reproach to the jurisprudence of our state, and an offense against public policy," the decision emphasized (Riggs v. Palmer, 1889, pp. 189-190). Issuing a ringing dissent, Judge Gray (although sharing the abhorrence of the act) argued that "... this matter does not lie in the domain of conscience … bound by the rigid rules of law which have been established by the legislature" (p. 192).

In *Riggs*, the majority derived a prohibition from benefiting from one's crime, even though it was not an exception in the text. Dworkin agreed with the case's outcome since it relied on the "ground of law" to interpret it (Dworkin, 1986). Today, the principle that nobody shall profit from their crime is commonsensical. When it was derived, it had not been so apparent.

Before turning to the jurisdiction of Nepal, it is worth exploring briefly how penumbral reasoning has played out in international human rights law in deriving a "right" to water and its attendant debates (Sangroula, 2017). The International Covenant on Economic, Social, and Cultural Rights (ICESCR) does not explicitly reference a right to water. The *travaux préparatoires* did not discuss it (Craven, 2006, as cited in Saul, 2006: 899). In interpreting Arts. 11 and 12 of the ICESCR, the General Comment 15 (GC 15) interpreted that the use of the word "including" indicates that rights were not intended to be exhaustive and that the right to waterfalls within adequate standard of living (CESCR, 2003, pp. 1–3).

Tully and Langford have debated each other on the GC 15's derivation of a right to water in a method similar to the Hart-Fuller debate. Tully (2006) has called the interpretation "revisionist," "unreflective," and "unhelpful" (p. 461). He argues that interpreting "including" to include a right to water means an 'endless list' of rights. Therefore, Tully argues that such a right can only be found through an amendment of the ICESCR by explicitly adding the right to water (p. 437). Langford (2006) disagrees with Tully, asserting that the right to water was never "rejected," as historical records indicate it was never discussed by the UN Commission on Human Rights or the

Third Committee (p. 439). In debating whether the right to water is a discovery or an invention, Bulto (2011) argued that silence on the issue can imply "tacit consent" (p. 17). In line with Tully's argument, the US Government has objected to the notion of a right to water, arguing that if something is essential, that does not automatically confer it the status of a right. (OHCHR, 2007, pp. 8, 12).

Noting the 'retrofit' of a right to water, Saul (2006) concluded that this right has been sufficiently established (p. 906). Bantekas and Ilias (2016) supported this view, asserting that water was implicit within the right to an adequate standard of living (p. 433). That said, the debate on deriving a right to water exemplifies the skepticism that may follow penumbral reasoning, including charges of abuse of judicial authority (Schroeder, 2022) or poor logical reasoning (Greely, 1961). No matter one's view on penumbral reasoning, it is fair to say that method becomes critical to study. With this context, I turn to the Supreme Court of Nepal cases.

To Derive or Not to Derive: Cases From the Supreme Court of Nepal

In the preceding paragraphs, I have explained the rationale behind my selection of the cases. In this section, I discuss select cases parsing the method of reasoning in deriving or refusing to derive a right implicitly.

Deriving a Right to a Clean and Healthy Environment

I begin with the widely-known Godavari Marbles case (Surya Prasad Dhungel, 1995) for what I call a "double-derivation". The 1990 Constitution, as it existed, did not explicitly provide (in a manner later Constitutions did) a right to life and the right to a clean and healthy environment.

Article 11(1) of the 1990 Constitution guaranteed: "All citizens shall be equal before the law. No person shall be denied the equal protection of the law". Article 12(1) provided that "no person shall be deprived of his personal liberty save in accordance with the law, and no law shall be made which provides for capital punishment." It is worth noting that the 1990 constitution did not explicitly provide for a right to life or a right to live with dignity (compared to the 2007 Interim Constitution Article 12(1) and Article 16(1) of the prevailing Constitution). As noted above, it referred to a negative obligation of non-deprivation of liberty and outlawed any possibility of giving the death penalty.

The petitioners claimed, among others, a violation of Article 11(1) since there had been a public harm and the Marbles Company had harmed the individual life and health of the individuals. At the earlier stage of the case, two judges disagreed on whether to allow locus standi to the petitioners. Hon. Gajendra Kesari Banstota observed that there was no jurisdiction since the right to a clean environment was not expressed in the Constitution (paras. 17, 23). Another judge, Hon. Kedar Nath Upadhyaya, disagreed.

After two judges could not reach a decision, a full bench of the Supreme Court concluded that the right to a clean, healthy environment is inherent within a right to life. In making the derivation, the Court's 'penumbral reasoning' was the following:

a. first, the petitioners have demonstrated harm to flora and fauna, natural environment, biodiversity, and health of people living nearby. The explosions and detonations from the factory create dust, impacting people's ability to breathe clean air. The Court cited Article 11(1), which has two prongs: non-deprivation of personal liberty (the constitutional text did not mention liberty *and* life) and providing against the death penalty by making laws. The Constitution did not explicitly state the right to life or deprivation of life. The Court concluded that this meant Article 11(1) also meant no arbitrary deprivation of life as a given;

b. Having reasoned that Article 11(1) also protects against robbing/depriving a person of their life and liberty, the Court concluded that a polluted environment

threatens human life and consequently robs them of their life. Further, it is a matter of the right of an individual to be free of a polluted environment (para. 30);

c. Next, the Court concluded that a right to a clean, healthy environment is inherent within a right to life (para. 31) and that a consolidated comprehensive law protecting the environment was urgently needed.

What is striking is that the Court seemed to have made a two-tiered penumbral reasoning in this case. Had there been a 'right to life' or a 'right to live with dignity' (as provided explicitly in the latter constitutions), deriving a right to environment would have been a typical penumbral reasoning, as discussed above. Here, the Court compared arbitrary deprivation of life [generally associated with the state's negative obligation] and extrapolated it to derive a general right to life first and then a right to environment second. In short, an action [by the actors causing pollution] could similarly rob a person of their right to life.

In justifying the inherence of a right to a clean environment, the Court also relied on the state policy of prioritizing protecting the environment and preventing further damage (Article 26(4)). Further, the Court referred to harm to biodiversity, the environment and persons, and the international normative legal domain catalyzed by the Stockholm Conference and the Rio Conference (paras. 32, 33). Using the reasoning, the Court rejected a restrictive interpretation approach to locus standi. Finally, the Court bemoaned the 'absence' of a consolidated comprehensive environment protection statute in the country, with some protections scattered here and there in different legislations (para. 34). As a result, it issued a directive order to prepare a law for the same.

In retrospect, what makes Godavari Marbles case noteworthy, apart from its double derivation, are subsequent constitutional developments. The 2007 Interim Constitution made two separate clauses in Article 12: one for a "right to live with dignity" (sub-clause 1) and "no person shall be deprived of his/her personal liberty" in Article 12(2). The 2015 Constitution went a step further to declare separately, in two different articles, a right to live with dignity (Article 16) and non-deprivation of liberty in Article 17. Both provided for a right to the environment, as noted above.

Fahnestock (2011) wrote that "implicit constitutional rights" were vulnerable "due to their lack of permanency" (p. 553). The subsequent Constitutions of Nepal have only consolidated the right to life and, separately, a right to environment.

Deriving a Right from What Has Not Been Prohibited

For a jurisprudential debate relevant to penumbral reasoning, I bring the readers a relatively old habeas corpus case from the pre-1990s era of Nepal: *Parshuram Banjade* (*on behalf of Yagyamurti Banjade) v. Durgadas Shrestha, Bagmati Special Court* (1970). The context is the partyless Panchayat system of governance in Nepal. The petitioners had been arrested for engaging in a student union and prosecuted under the National Directive Act, 2019 B.S. The Act had prohibited many unions and organizations from operating. Interestingly, the second amendment of 2024 B.S. of the Act had specifically removed the phrase 'student union' from the prohibitory ambit of the Act (para. 20). An issue, among others, before the Court was whether those arrested for being part of a student union could be prosecuted or not, in light of the amendment.

The government attorney argued that, despite the amendment, the student union was to be read *ejusdem generis* with other representative and professional organizations prohibited by the Act. The Court disagreed. It gave primacy to the amendment (removing the phrase 'student union'), concluding that it reflected the legislative intent of not incorporating student unions in the ambit of prohibited organizations (para. 18).

That gave rise to an interesting question relevant to penumbral reasoning. If something (in this case, student union) is not specifically prohibited, is it permitted? In other words, absent

a prohibition, is there a *right* to do it? One may compare this question to whether there is a right absent a constitutional guarantee. This is a question that continues to baffle many, even today. For instance, the Lotus principle in international law states that sovereign states may act as long as they do not violate an explicit prohibition (*SS. Lotus*, 1927).

To the question, the Court answered in the affirmative, i.e., there is a right to do something if it is not prohibited (para. 20). In a single paragraph, the Court offered the following reasoning:

a. First, the Court distinguished between an authoritarian form of government and a democratic government in light of the question. It pointed out that authoritarian governments curtail the rights and liberties of their citizens; on the contrary, democratic governments guarantee rights and liberty.

b. Then, it swiftly announced that the Panchayat government was a democratic government with "full freedom." To do so, the Court considered the Constitution's specific amendment and other fundamental rights.

c. Finally, the Court concluded that when a democratic government does not prohibit something, such as the student union, it is permissible as a right (para. 20).

Deriving a 'Right to Have One's Own Identity

In the *Sunil Babu Panta v. Government of Nepal* (2009), the petitioners demanded recognition of the third gender by the Government for the protection of the rights of sexual minorities, including recognition of same-sex marriage. They relied on the right to live a dignified life, the right to equality and the right to non-discrimination, and the right to privacy of the Constitution. In their rejoinder, representatives from the Government argued that *all* citizens of Nepal were equal and subject to the equal protection of the law and non-discrimination, irrespective of whether a person is a member of the sexual minority or not, making the writ petition moot.

The Court decided that there is a "right to have one's own identity" based on a confluence of multiple rights, state policies, and directive principles from the Constitution. This stated right was derived in the following method:

a. First, the Court painted a broader picture of social stigmatization and concomitant problems faced by members of the sexual minorities in asserting their identities and enjoying a dignified life free of discrimination. The Court noted that the status quo of the traditional binary of a man and woman did not allow the visibility of the identity of sexual minorities and third-gender persons.

b. Then, the Court discerned a constitutional vision of equality and non-discrimination by relying on multiple rights and state policies.

c. Making multiple references to this 'right to have one's own identity' and making that identity visible, the Court directed the Government to allow them to identify as 'others'. It exhorted that the impending 2015 Constitution avoid the binary of man and woman where appropriate (para. 6).

Having recognized the right to identity of the 'third gender' persons, including members of the sexual minorities, the Court stopped short of fully deriving and declaring a right to marry. It adopted what I call a "half derivation"; in theory, it demonstrated an inclination to find a right for same-sex couples to marry (by referring to it as being inherent in the decision) but did not go as far as to declare the right in that decision itself. This is a technique the Court seems to have used in another instance (*Uttam Prasad Rijal v. Government of Nepal,* 2018), as I shall appreciate further below. By making a judicial commentary, the Court issued a directive order to the Government to create a committee to study the possibility of recognizing same-sex marriage in Nepal and report its findings to the Court (para. 6).

Deriving a Right to Marry from the Same-Sex

In *Adheep Pokharel v. Ministry of Home Affairs, Immigration Department* (2023), the Court completed the course that began in the *Sunil Babu*

Panta case (2009). Earlier, in a case with similar facts, Suman Panta v. Home Ministry (2018), the Court had issued a writ of mandamus requiring the issuance of a non-tourist visa for a foreign woman married to a Nepali woman (para. 18). The Court had relied on equality, non-discrimination, and a 'right to self-determination' to live with dignity with one's identity (para. 19). The Court reasoned that since the terms 'person' or 'citizen' in the law were not limited to binary men or woman (para. 6), the same-sex partner had to be recognized. The Court limited its elaboration, awaiting the study of the Government on the possibility of recognizing same-sex marriage. It recommended that the study also considered the growing trend of legalizing same-sex marriage in other countries.

The *Adheep Pokharel* case offered a more detailed jurisprudence (relative to *Suman Panta)* on the derivation of the right of a same-sex couple to marry; therefore, I rely on the case for the article. The Court announced that a foreign national spouse (in this case, a German man) married to a Nepali man (in a foreign country) is entitled to receive a non-tourist visa—in essence, recognizing the same-sex marriage carried out in a foreign country (para. 45). The Court's reasoning can be broken down in the following points:

a. First, it relied on the recommendations provided by the Committee formed by the Government of Nepal to recognize same-sex marriage (as the Court had directed the Government to do in *Sunil Babu Panta case*, 2009);

b. It noted the drafting history of the fundamental rights of the 2015 Constitution of Nepal, which had provided for a right to family (para. 13), including gender-neutral terms to accommodate same-sex couples (para. 16);

c. It piggybacked on a considerable body of its earlier jurisprudence, such as the right of same-sex couples to cohabit together (*Prem Kumari Nepali v. Government of Nepal,* 2013); the right of sexual minorities to receive passports in the "others" category (Dilu Buduja v. Government of Nepal, 2013), and more decidedly, the Suman Panta case (2018). Interestingly, it cited a surrogacy decision (Pushparaj Pandey v. Government of Nepal, 2017) in which the Court had made a passing reference to study the implications of allowing commercial surrogacy, including to "Nepali same-sex couples" (para. 24). This, the Court saw as an anticipation and an implicit recognition of same-sex marriage involving both Nepali citizens.

d. Then, it noted and interpreted the term 'dampati' or 'couple' used in Article 38(6) of the 2015 Constitution—rights of women (para. 14, 39). It found the term to be gender-neutral in contrast to other provisions citing men and women. The Court took this to mean that marriage could be understood outside the heteronormative traditional binary sense.

e. Further, it harmoniously interpreted a confluence of the right to equality (obligation of non-discrimination), right to privacy, right to a dignified life, and the broader schema of state policies and directive principles relating to a vision of creating a more just and inclusive society (para. 15).

f. It relied on state practices specifically where same-sex marriage has been legalized and implicitly, where same-sex relationships have at least been decriminalized (such as Bhutan). Furthermore, it discussed the example of Vietnam in Asia in allowing same-sex marriage and stressed the example that Nepal could become a guiding light in South Asia through its recognition; it emphasized how even the landmark decision of India on decriminalization of same-sex relationships had cited Sunil Babu Panta decision in arriving at its decision (para. 44).

g. Finally, the Court drew strength for its decision from a range of international law instruments, outlining them briefly in a paragraph, including the Yogyakarta principles on sexual orientation and gender identity (para. 40); also, briefly touched upon was the National Civil Code's relevant provision on Private International Law and marriage conducted in foreign countries as falling within the scope of the same (para. 39).

Cumulatively, the Court issued a directive order to issue a non-tourist visa to the foreign same-sex spouse of a Nepali national, requiring amendments to be made in Point no. 11 of Schedule 2-a of the Immigration Rules, 1994. Additionally, it ordered the removal of binary man/woman terms from the laws in favor of gender-neutral terms (para 36, 45). The Court had not issued this directive order in the case of Suman Panta.

Deriving a Right to Abortion

In *Laxmidevi Dhikta v. Government of Nepal* (2010), a significant issue was whether abortion was a right of a woman or not. The Interim Constitution of Nepal, in Article 20 (Rights of women), in sub-clause 2, guaranteed the right of every woman to reproductive health and other reproductive rights. The Court declared that within the ambit of a right to reproductive health, a right to abortion is embedded. The Court stated that reproductive right could not be understood as a compulsion to procreation; in case a woman does not desire to give birth, it also includes a right to deny procreation (para. 40). As a broad analogy, the Court discussed that when a person may carry out a function as part of a right, they are naturally free not to carry out the same (para. 40).

Abortion had been strictly regulated by the penal laws relating to homicide in Nepal. Except under specific restrictive grounds, a termination of pregnancy constitutes a homicide. In its decision, the Court discussed the interconnection of abortion with a broader confluence of rights, namely, the right to health, right to life, and also right to social justice (para. 75). Declaring a right to abortion a "new right" that is "ascendant" (translated verbatim from the decision), it would be inappropriate to keep it under the confines of a strict penal law relating to homicide (para. 75).

The Court mentioned the growing trends of decriminalizing and liberalizing abortion in multiple jurisdictions. It touched upon the pro-life versus pro-choice debates briefly, then went on to cite the now overruled Roe v. Wade decision of the United States Supreme Court as an authority on the debate surrounding when the life of the unborn begins (para. 9). In face of the uncertainty of the beginning of life, the Court reasoned that it would be most appropriate to protect the interests and rights of the mother (para. 9).

The Court presented the pressing need to liberalize abortion by looking at the high number of unsafe abortions in Nepal (para. 19). The 11th Amendment of the Muluki Ain 2020 B.S. had allowed abortion in some instances up to stated gestation weeks (I shall not enter into the details of the law in this article because the purpose is to study Court's method of reasoning). Because the amendment allowed abortion, albeit on limited grounds, the Court took it to mean that the law had guaranteed it as a right and it was no longer a "legal question," only an "academic question" (paras. 29, 31). This can be compared to what Bulto (2011) referred to as "tacit consent" (p. 17). The Court then supplemented this reasoning by looking at subsequent practices (such as the Interim Constitution guaranteeing reproductive health and rights) and relevant international obligations of Nepal (para. 22).

Notably, the Court carried out an ex-ante analysis of the penal code relating to abortion before the 11th Amendment of the Muluki Ain 2020 B.S. Through the amendment and the ex-post constitutional guarantee of reproductive rights, the Court observed a shift in old values on criminalizing abortion, which could be taken as a recognition of a right to abortion. That said, the Court still issued a directive order to create a separate and adequate law on abortion (paras. 90. 101). Thus, from the penumbra of rights of women, the Court derived a right to abortion.

Deriving a Right Not to Vote Within a Right to Vote

In *Bikash Lakai Khadka v. Office of the Prime Minister* (2013), the issue was not as much a derivation of a right as much as whether one may choose not to exercise one's right as a matter of right. The petitioners claimed that they had a right to reject candidates in elections. If the voters did not want to vote for any of the candidates presented, they would either have to boycott the election by not turning out or leave the ballot paper unmarked, in which case, their rejection of the candidates would not be conspicuous. They sought a writ from the Court to order the Government to print "none of the candidates" as an option in the ballot paper. Earlier, in the *Laxmidevi Dhikta* case (2010), the Court had hit at something comparable: that a reproductive right entailed a right to procreate and not to procreate.

The Court drew an analogy with freedom of expression broadly (para. 5). Just as freedom to express includes a freedom not to express, it must be presumed that a right to vote includes a right not to vote (para. 6). The Court drew its reasoning also based on the right to privacy of a person guaranteed by the Constitution and directed that there be an option to reject candidates in the ballot paper to protect the privacy of the person who does not turn out to vote (para. 35).

To Derive or Not to Derive: A Question

In the preceding paragraphs, I put forth some select 'landmark' cases in which the Court derived from the penumbra of an explicit constitutional right an implicit right. In this part, I juxtapose the previous section with a few cases in which the Court was inclined toward derivation but stopped short of doing it. This juxtaposition can further illuminate the penumbral reasoning method.

Right to Be Protected from Sexual Harassment

In *Sharmila Parajuli v. Government of Nepal* (2004), the petitioners claimed that sexual harassment in the workplace was not addressed by the prevailing laws of Nepal, including the Chapter on Harassment in the then Muluki Ain. Not only did the petitioners seek a directive order from the Court on the formulation of a separate law to protect against sexual harassment in the workplace, but they also prayed that the Court declare "a right to be protected against sexual harassment" (quoted verbatim) until such a comprehensive law is put into place by the legislature (paras. 5, 7, 14).

Acknowledging the paucity of law, the Court issued a directive order to create a comprehensive law protecting women, specifically in the workplace. That said, it did not accept the petitioners' invitation to declare, in the interim, a right to be protected against sexual harassment in the workplace. In refusing to make this derivation in the decision, it reasoned the following:

a. First, there was no vacuum or a complete absence of a law to protect against harassment; the existing protection of law seemed inadequate to cover the workplace and was scattered in different legislations (paras. 28, 32).

b. Second, the analogy of Vishaka and others v. State of Rajasthan (1997) from the Indian Supreme Court that the petitioners had relied on, the Court found, was not appropriate to be imitated, given the diverse contexts of the two countries. Very briefly, the Court touched upon the debate surrounding the decision before immediately stating that it would be unwise to analyze the foreign decision (para. 32). The petitioners had relied on Gopal Shiwakoti v. Finance Ministry (1994) as their basis for seeking the declaration of a right via Court. The Court rejected the comparison with the case. Unlike the former case, in the instant case, the issue was not an absence of a law but instead of inadequacy (para. 32).

c. Finally, the Court, accepting the argument of the Government Attorney, concluded the inappropriateness in a Court declaring a right, a domain of the exclusive competence of the legislature.

While accepting the inadequacy of the law in protecting against sexual harassment in the workplace, the Court deferred the derivation of this right to the legislature, offering explanations of judicial restraint.

Right to Die

In *Uttam Prasad Rijal v. Government of Nepal* (2018), the petitioners, in 2015, sought a declaration from the Court of a right to die as a logical corollary of the right to live with dignity guaranteed under Article 12(1) of the Interim Constitution of 2007. At the time of the petition in 2015, the Constitution of Nepal was nearing promulgation. The petitioners specifically sought through the Court a declaration of a right to die to be added to the final text of the Constitution. The Court did not issue this writ petition. Despite multiple efforts from the Court, the petitioners had failed to appear before the Court to aid in oral proceedings—a gesture the Court viewed as being unprofessional and the petition as cheap publicity (para. 7).

That said, the Court still meditated briefly on the pertinent question regarding the right to die. At the very outset, the Court established that "in principle" (verbatim translation from the judgment), a right to life includes a right to die (para. 11). Then, it contrasts this principle with the actuality of Nepal in which many people struggle to live due to shortage of basic necessities. The Court took an ex-ante perspective of the historic struggles Nepal has made to realize human rights (para. 13). It explored the morality and policy implications of recognizing, through the decision itself, such a right (paras. 12, 13). Based on the above reasoning, the Court concluded that declaring a right to die would be counterproductive in the current scenario.

Reproductive Right via Surrogacy

In *Pushparaj Pandey v. Grande City Hospital case* (2017), the petitioner sought a writ to prohibit any and all commercial surrogacy in Nepal. The hospital conducting surrogacy justified its action based on the Health Policy of Nepal that had aimed to combat infertility through surrogacy and to promote Nepal as a site of medical tourism for foreigners wanting to undergo surrogacy. Noting that Nepal had no legislation to regulate surrogacy at the time of the Court decision, the public morality questions it raised, including the exploitation of women (para. 30) and the far-reaching policy and legal implications of allowing surrogacy (paras. 19, 20) the Court ruled that commercial surrogacy cannot be permitted (para. 33).

Article 38(2) of the 2015 Constitution guarantees the right of every woman to safe motherhood and reproductive health. The Court did not analyze whether surrogacy could be a way to operationalize Article 38(2). Neither was a discussion of a right to found a family provided under Article 16 of the Universal Declaration of Human Rights. The text of the judgment does not show that the hospital side relied on any of the rights. Since the petitioner moved the Court seeking an order to put an end to commercial surrogacy in Nepal, it is possible the Court viewed the legal question based on the potentially exploitative use of surrogacy, absent a legislation. Had a petition been made by, say, a family seeking to use surrogacy as a way to found a family relying on the above normative frameworks, the Court may have been invited to delve into the right to found a family and whether surrogacy can be a pathway to exercise of such right. At this point, I can only make a counterfactual conjecture to add a nuance for the readers.

Before concluding, I draw the readers' attention to two instances that may not be directly related to derivation but can somehow speak to the inclination of the Court to find a legal obligation, even when a codified treaty basis was absent. In Mehmood Rasid v. Department of Immigration (2007), the petitioners were Pakistani nationals who cited fear of persecution upon being returned to Pakistan on religious grounds. UNHCR had issued them a mandate for refugee status. The government of Nepal had an agreement with the UNHCR to allow it to operate in Nepal, which is governed by its statute. The issue was whether UNHCR could unilaterally afford the petitioners a 'mandate refugee' status. Answering in the affirmative, the Court deferred to the Statute of UNHCR and cited

Nepal's international commitments and multiple recommendations it had received from treaty monitoring bodies to support its reasoning (para. 23). Despite not being a party to the 1951 Refugee Convention; the Court declared non-refoulement to be a peremptory jus cogens norm (para. 4). It did not elaborate any further. It cited Article 33 of the 1951 Refugee Convention on non-refoulement in multiple instances in the judgment. In the Rabindra Dhakal v. Government of Nepal (2007) case, a question arose regarding the applicability of the 2007 UN Convention for the Protection of All Persons from Enforced Disappearances in the transitional justice-related prosecution in Nepal. Notably, Nepal, at the time of the decision, was not (and still is not) a party to the Convention.

Nevertheless, the Court asserted that Nepal cannot exempt itself from its obligation to protect its citizens from enforced disappearance. In justifying its assertion, the Court concluded that the norms of the Convention reflected standards of customary international law binding regardless of the status of treaty ratification. Earlier, in the Rajaram Dhakal (2004) case, the Court had relied on the International Covenant on Civil and Political Rights to find an obligation to protect against enforced disappearance while directing the Government to enact legislation to implement the four Geneva Conventions of 1949.

In sum, these cases help us understand the compelling reasons the Court looks at in deriving obligations, whether through derivation or by appealing to the customary nature of the legal principle. The article does not intend to explore how the Court has approached international legal obligations absent a positive legal basis; I offer the examples only to add a helpful nuance, as stated earlier.

Conclusion

In this article, I proposed to study how the Supreme Court of Nepal derives an implicit right from the penumbra of an explicit constitutional right. Keeping the conceptual framework of penumbra at the forefront, most popularized by the *Griswold v. Connecticut* case, the article parsed the penumbral reasoning of the Supreme Court of Nepal in select 'landmark' cases, juxtaposing them against a few instances in which the Court did not fully derive the right. In almost all instances of derivation, the Court did not utilize any language suggesting that it was innovating the right derived or acting as a "norm entrepreneur." As Reynolds (1992) suggested "reasoning by interpolation," the judges did not hint at an interpolation or having gone out of the way to add something new to the text. They justified the implicit rights as having always been there or inherent in the explicit. Even though the cases were deemed "landmark" for their outcome in the public discourse, a straightforward reading of the reasoning would suggest judges doing the obvious. Even in the *Laxmi Devi Dhikta* (2010) case, the Court referred to the ascendant 'new' right of abortion. Still, its reasoning relied on the previous statutory amendment as a basis of derivation.

In all cases of derivation, the Court relied on a confluence of multiple explicit constitutional rights. This approach is similar to the Griswold approach of extracting a 'common idea' or 'emanation' from numerous provisions of the Constitution and international legal obligations. Despite their non-justiciability (direct enforceability) in the Court of Law, the Court drew strength from state policies and directive principles of the Constitution. Similarly, the Court seems to be emboldened to ride the tide when it has sufficient examples of other countries doing the same, for instance, in recognition of the right to identity of the sexual minorities, the right of Nepali nationals to marry from the same sex, and the right to abortion. In all cases, the Court referred to a patent social problem the derivation was expected to address.

In cases of "half derivation", the Court seemed inclined to recognize the right, in theory, or principle but refused to go all the way, citing the potential impact of the derivation in law and policy (for example, *Uttam Prasad Rijal* (2018); *Pushparaj Pandey* (2017)). It examined whether the existing conditions were ripe enough to introduce such a right, employing a somewhat prudential

cost-benefit analysis. In Sharmila Parajuli (2004), it deferred to the legislature to create a law to address the problem of sexual harassment, citing that there was no complete absence of law, instead that laws were inadequate.

Even though the conceptual framework of penumbra was primarily utilized in American constitutionalism, the study of derivation in Nepal reveals the role of the judiciary in not only deriving the implicit from the explicit but eventually contributing towards making the implicit explicit in the Constitution. Unlike the US, Nepal has had numerous opportunities to draft a new constitution. For example, an implicit right to a clean environment was made explicit right to the environment by the subsequent Interim Constitution of 2007 and the 2015 Constitution of Nepal. An implicit right to life with dignity was made explicit again. I cannot assert a causation, but a correlation seems obvious.

Over time, the Constitutions of Nepal have attempted to include a wider enumeration of more specific rights, possibly to accommodate the Court’s interpretations and paradoxically to minimize the need for the Court to derive penumbral rights.

It must be noted that no cases referred above have explicitly employed the penumbra's conceptual framework in their reasoning. It was not my intent to appraise whether the Court was correct in making the derivation or refusing to do so; therefore, I have limited the article to laying out the cases as they are. Any derivation of a right can be debatable as the conceptual debate surrounding the core and penumbra suggests. By studying their method of reasoning in light of the conceptual framework of the penumbra, I have attempted to emphasize that it is not only the outcome of landmark cases that are to be discussed but also the method with which they were decided.

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