THE NATURE OF A WELL-TEMPERED RIGHT: EXAMINING PRECEDENTS, STATUTES, AND CONSTITUTIONAL FRAMEWORKS ON RIGHT TO ARMS IN INDIA AND UNITED STATES

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INTRODUCTION

Recently in Supreme Court of India took up a *Suo Motu* case on the regulation of 'unlicensed fire-arms' in Indian States. The Court in an order commented that *"unlike the US constitution where the right to bear arms is a fundamental right, under the wisdom of our founding fathers, no such right has been conferred on anybody under the Constitution....It is the greatest significance to preserve life of all that resort must be made to stop unlicensed fire arms in particular."*[1] Parallelly, in a 1993 Judgement,[2] a state High Court held that "*the right to carry arms for self-defence is a part of Article 21 of the Constitution*." Unlike the high court decision, the Supreme Court's decision seems to be a mere observation on the enumeration of the right and not a decision whether the right may substantively be found elsewhere in the constitution. Thus, there is ongoing research on whether a right to arms can be substantively found in the Indian Constitution.

In contrast, Unted States has been one of the extraordinary jurisdictions where a right to own and carry weapons has been enumerated as a fundamental right. Both India and US had been under colonial regimes, and the constitution makers in both regimes discussed over guaranteeing such a right to its citizens, however, while one nation took up the issue and authoritatively guarantee such a right, the other did not or perhaps ignore the concern around the said issue altogether.

The motivation of this paper comes from a thought that, as showcased throughout history, tyrannical regimes have often led the charge against the benign ownership of weapons as means securing the subjugation of their subjects. Today as the debates surrounding weapon-regulations and their constitutional validity rage around the world, we still have no guarantee that as to whether upon the collapse of a constitutional system or on a mutiny, the rights of an individual would still be protected. Thus, it shall be argued that the right to arms is one that secures a symbolic protection against systematic political & cultural oppression, yet provides individual protection and safety guarantees throughout such turbulent times.

In this attempt, Part I of the paper describes what is the nature of a 'well-tempered' right, and the conception of the right to bear arms in two frameworks: The right to Keep Arms (A Customary Rights) and The right to carry Arms (A Civil Liberty). Part II compares how US and India recognise the 'Right to Keep Arms' differently and Part III discusses the 'The right to Carry Arms,' in a similar manner. Part VI analyses how the right can be viewed as 'well-tempered' right, in an enumerated right jurisdiction (US) and unenumerated right jurisdiction (India), and suggest design framework on how such a right may be well-tempered.

BACKGROUND OF THE STUDY: POLITICAL CULTURE OF DISARMING DISSIDENTS

Depriving the citizenry of the right to keep arms has been a tactic of several authoritarian regimes of today and before. This has been seen in numerous countries and regions around the world, including Nazi Germany, China, Venezuela, and Russia. In Nazi Germany, the

[1] Rajendra Singh v. State of UP, SLP (Crl.) No. 12831/2022.
[2] Ganesh Chandra Bhatt v. District Magistrate, AIR 1993 All 291.

government passed the Weapons Act in 1938, which required all firearms to be registered and allowed the government to confiscate guns from anyone deemed to be a threat to public safety. This law was used to disarm Jews and other groups deemed to be enemies of the state.[3] In Venezuela, the government under President Nicolás Maduro has passed laws banning the sale and possession of firearms, and has conducted several high-profile disarmament campaigns, which critics argue are aimed at disarming opposition groups and preventing them from organising against the authoritarian government.[4] Finally, in Russia, the government passed a law in 2013 banning the possession of firearms by individuals with a history of mental illness or substance abuse, as well as those with certain criminal records, which some argue is overly broad and could be used to disarm political dissidents or other groups deemed to be a threat to the government. Similarly, in 124 B.C.E the imperial chancellor in the court of Emperor Han of China, petitioned to the king to disarm their empire's subjects. However, the emperor declines the petition by arguing the following: "*Your subject has heard that when the ancients made the five kinds of weapons, it was not for the purpose of killing each other, but to prevent tyranny and to punish evil. When people lived in peace, these weapons were to be prepared against emergencies and to kill the fierce animals. If there were military affairs, then the weapons were used to set up defences and form battle arrays …"*[5] Thus, the use of disarming citizens as a means of maintaining authoritarian control has been a recurring theme throughout history. As political scientist Robert J. Spitzer notes, "*one of the central features of authoritarian rule is the desire to disarm the population*."[6] By disarming citizens, these regimes hope to prevent any organised resistances to their rule and maintain power through force and intimidation. However, history has shown that the suppression of individual liberties, including the right to keep arms, can lead to greater levels of oppression and unrest, thereby warranting such a right to be protected than be curbed.

RESEARCH METHODOLOGY:

I shall refer to the Indian Constitution, The United States Constitution, the Complete decisions of United States and Indian Supreme Court, Federalist Papers several sources of the like kind as primary text.

I shall also refer to books, Journal Articles, Constitutional Law Commentaries concerning right to bear arms in India and United States as secondary sources.

The research employs Migration of Ideas method of comparative research. Migration of Ideas method as discussed by VC Jackson,[7] studies how legal concepts as it exists in one system migrates and is engaged within other legal system. The comparative work in my thesis engages with the rights to keep arms, under a colonial regime which would entail some historical debate on logic for such a right, and how the assertion for such a right in Positivistic terms under a written constitutional text traces its origin to an Anglican constitutional document 'the Magna Carta' in England. The research shall compare how in the American experience borrowed the

[3] Bernard E. Harcourt, *The Nazi War on Firearms: Background, Implementation, Legacy*, Fordham Law Review (2013)
[4] Javier El-Hage, *Venezuela's Disarmament Campaign: An Analysis*, BBC, HUMAN RIGHTS BRIEF, (2015), https://www.bbc.com/news/world-latin-america-18288430.
[5] Stuart R. Hays, *The Right to Keep Arms, A Study in Judicial Misinterpretation*, 2 Wm. & Mary L. Rev. 381 (1960).
[6] ROBERT J. SPITZER, POLITICS OF GUN CONTROL (Oxford University Press, 2009)
[7] V C Jackson, *Comparative Constitutional Law: Methodologies*, in: M ROSENFELD AND A SAJO (EDS), THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (2012).

right to bear arms as a specific right that was reserved for the 'Englishmen,' and transformed it into a general right to all its Citizens since the advent of its Independence. Similarly, the research will compare how, the British although secured this right to bear arms for its Anglo-Indian Citizens (for them being Englishmen) but at the same time restricted the same for Indians. However, the research will show this trajectory of right to bear arms ended in a different trajectory post-Independence.

Borrowing from Hirschl,[8] the pattern of comparative case selection method that my thesis would follow is the model of *self-reflection or betterment through analogy, distinction, and contrast*. Unlike what Hirschl quotes from Mark Tushnet that, some form of comparative work under this methodology follows a 'false necessity,' i.e. "*constitutional measures that might appear necessary to maintain order, but in fact are not necessary*," the current research is not finding answer to where there is no question. In fact, it is a comparison of a fully developed legal right of one form under the US Constitution, the Right to Bear Arms, and developing legal right through judicial treatment in the Indian Constitution. Since, right to bear arms is not only viewed as a civil liberty but also a customary practice, emulating constitutional mechanisms from American Jurisprudence on Right to Bear Arms can enhance the Indian constitutional practice around the enforcement of the said right. The paper examines the right as both a customary practice and a civil liberty, highlighting how each framework has distinct contextual relevance in both jurisdictions. For example, in the United States, the right to keep arms as a customary practice may draw parallels with the traditions of Native American populations maintaining certain forms of weapon-tools. Similarly, in India, the Sikh community has been granted a constitutional right to keep traditional swords. Comparing India with the United States addresses another issue: the judicial reliance of Indian courts on U.S. case law regarding the right to bear arms, particularly predating the judgment in *D.C. v. Heller*. Although India recognizing an individual right to private defence as a statutory privilege, it has not embraced the self-defence as right, as was done in *Heller* and subsequent cases. Nonetheless, Indian courts, have repeatedly cited the decision in *Presser v. Illinois*, which appears to have been overturned by *D.C. v. Heller*. Moreover, the U.S. serves as an ideal comparator for India due to their similar post-colonial common law legal systems and robust forms of judicial review, wherein constitutional courts significantly influence how citizens exercise their rights in everyday life.

[8] R. Hirschl, *Case Selection and Research Design in Comparative Constitutional Studies*, in COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW (Oxford 2014).

CHAPTER I

'WELL-TEMPERED' POWER: A THEORETICAL FRAMEWORK

In the context of constitutional design, Martin Krygier conceptualizes the theory of a 'well-tempered' constitutionalism. According to him, political moderation, and the design of a constitution, closely reflects on the commitment to uphold constitutional norms and rule of law values. Krygier employs the term 'tempering power' to emulate this idea. In the framework of constitutionalism and the rule of law, he contends that tempering power suggests a considerate combination of 'balance, moderation, and self-awareness.'[9] In contrast to the prevailing perception of rule of law and constitutionalism as merely restraint of absolute power over a polity, the aim of 'tempering' power aligns with idea that constitutionalism and the rule of law may also serve and augment the beneficial usage of authority. A similar conception is found in the ideas of Stephen Holmes who describes a similar framework known as 'positive constitutionalism.'[10] Holmes argues that if constitutional rules are seen as scripts and not ropes, then political actors, would incorporate constitutional protocols in their political action with a primary obligation towards constitutional law and not merely their political interests.[11] Krygier argues that while constitutionalism involves creating a formal design to impose substantive limitations on authoritarianism, the rule of law outlines the content, form, and procedures through which the state fulfils its legal obligations. However, there is no established concept that integrates constitutional design and the rule of law to ensure a balanced exercise of governmental authority in relation to individual rights. Jeremy Waldron takes a critical view, rejecting constitutionalism because it associates the functioning of a constitution with limitations on the power of constitutional bodies. Waldron argues that constitutionalism does not enhance the potential and authority of constitutional provisions. However, some constitutional provisions may be "*inflexible, insensitive, or justified only by history or precedent*," leading to arbitrary state authority.[12] Thus, there needs to be a moderating principle which allows law to evolve for the times it is in existence and therefore, tempering power becomes important.

Tempering power is also an important facet in judicial review. One such exposition is by Justice Roger J Traynor, who argues for a 'well-tempered' judicial decision making.[13] He argues that an alert judge when reviewing law for its substantive core against the permissible limits under a hierarchy of norms, must be "*mindful that he must make haste slowly, in the interest of orderly transition, from a doomed rule that was either inept from its inception or has outlived its usefulness to an emergent rule whose aptness has yet to be tested. The promulgation of a new*

[9] MAURICE ADAMS, ANNE MEUWESE, ERNST HIRSCH BALLIN (EDS.), CONSTITUTIONALISM AND THE RULE OF LAW: BRIDGING IDEALISM AND REALISM 29 (CUP, 2017).
[10] S. HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 51 (University of Chicago Press, 1995).
[11] S. Holmes, *Constitutions and Constitutionalism, in* M. ROSENFELD AND A. SAJÓ (EDS.), THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 202 (Oxford University Press, 2012).
[12] P. Selznick, *Legal Cultures, and the Rule of Law, in* M. KRYGIER AND A. CZARNOTA (EDS.), THE RULE OF LAW AFTER COMMUNISM 26-27 (Aldershot: Ashgate, 1999).
[13] Roger J. Traynor, *The Well-tempered Judicial Decision,* 21(3) Arkansas Law Review And Bar Association Journal (1967).

rule must be skilfully timed if the decision is not only to be well-tuned to the time but also, well-tempered to the judicial process."[14]

This paper proposes that the rule of law and constitutionalism can harmoniously develop in a "well-tempered" manner, incorporating both constitutional provisions and judicial decisions. Well-tempering is not a principle but a value or quality. Krygier suggests that tempering power should extend beyond the formal design of a constitution and be achieved by understanding the social functions of law. Krygier's concept is a normative political value, and this paper argues that it can be reflected in constitutional provisions through a framework derived from legal rubrics and grammar.

Fundamental rights and state obligations under a constitution are central to instilling the values of rule of law and constitutionalism. Given that these are normative values, it is essential to examine the infrastructural power models within a system to determine how well a constitutional state upholds them. This paper proposes a "well-tempered" legal system, which integrates balance, moderation, and self-awareness into both the text and interpretation of the law. While acknowledging the various interpretations of rule of law and constitutionalism, this paper aims to incorporate these qualities, aligned with the concept of tempering power, into a specific fundamental right provision.

Framework of a 'Well-tempered' Right

Framing a law often involves two features, a rule, and a standard. Generally, compliance to such a law involves three stages, *firstly,* a law is promulgated as a rule or a standard; s*econdly,* the subjects of the law determine their compliance towards the said law. Because of a laws fresh promulgation, subjects at this point are imperfectly conversant of the law's directions, subjects either comply based of their reasonable understanding of the law or seek legal consultation, which enables them to closely predict the form and application of the law; *thirdly,* an adjudicator reviews the subject's compliance to the law, by authoritatively deciding the governing content of the law.[15]

It is conceivable that a similar treatment is met out with a promulgation of a right under the constitution. A legislation and a constitutional right, although existing in different hierarchies in the legal system, often involve the same subjects and compliance obligations. For instance, Article 17 of the Indian Constitution provides, *""Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law."* In this provision, the constitution does not wait for the parliament to make a law to prohibit untouchability, rather spells out the law itself as a guarantee against certain acts, here the subject of law is not just the state who has an obligation to make a law but also individuals from committing "untouchability." To that extent, the provision does not even spell out what untouchability means, rather it assumes that the subjects are aware of the practice in its common sensical understanding and therefore, the application of the article functions just as a legislation. Thus, a fundamental right, as conceived to have the highest degree of protection by state machinery, can be translated into this framework by understanding it to be the highest promulgation of law in the hierarchy of norms.

[14] *Id,* 1.
[15] L Kaplow, *Rules versus Standards: An Economic Analysis*, 42 Duke Law Journal 557 (1991).

Following this understanding, such a right may possess characteristics that ensure its enforceability both before and after its implementation. Rules involve a prior determination of the law's substance, while standards require a subsequent interpretation. Logically, since rules need to be defined when established, they are more expensive to create than standards. Conversely, standards need interpretation by individuals and judges, making them more costly later on.

When laws are set in advance as rules, they often end up either too broad or too narrow due to the lack of complete knowledge at the time of their creation. Overly broad rules unnecessarily restrict individual freedoms by imposing excessive liability, while overly narrow rules fail to prevent harmful behaviour by not imposing liability when needed. Thus, overly broad, or narrow rules tend to negatively impact individuals. The cost or detriment to lawmakers or individuals includes both social costs and monetary liabilities. Social costs may involve compromises with political interests to pass the law and the expenses of establishing forums and agencies for compliance. Additionally, individuals incur costs not only to modify their behaviour in compliance with the rule but also to litigate any misapplication of it.

A well-tempered right aligns rule coverage with the costs imposed on individuals. If establishment costs exceed interpretation costs, the right should be framed as a standard rather than a rule. A well-tempered right provides clear rules for understanding its content and standards for judicial moderation by assessing social costs.

A 'Well-tempered' right to be armed

This paper aims to analyse how the right to keep and carry arms can be understood as a well-tempered right. It argues that this right comprises two branches originating from different legal categories: customary law and statutory enactment. Customary law views the right to keep arms as a tradition that gains passive acceptance when regional or familial partnerships adopt it as an interpersonal duty. This practice embodies the community's self-governance. Initially, the customary right to keep arms may not have been a legal norm, but through subsequent positive laws acknowledging the group's practices, it becomes a protected liberty and attains fundamental right status.

On the other hand, the right to carry arms is seen as a civil right authorized by established law, particularly under common law through the right to private defence. This right may be explicitly provided or linked to the right to self-preservation as a defence for using arms. In countries where carrying arms is not a right and is strictly regulated by licensing, it is challenging to conceive a fundamental right to carry arms. However, if the right to self-preservation is recognized as a fundamental right to life and personal liberty, the right to carry arms could be included within that framework. The United States explicitly guarantees the right to keep and carry arms, whereas India has neither such an explicit right nor allows most forms of arms without a license. This paper explores which jurisdiction aligns more closely with the concept of a well-tempered right. It concludes by proposing a framework for a well-tempered right that balances and moderates the social costs of creating such a right with the discretion granted to state authorities.

CHAPTER II

RIGHT TO 'KEEP ARMS': A CUSTOMARY RIGHT

"*The rifle itself has no moral stature, since it has no will of its own. Naturally, it may be used by evil men for evil purposes, but there are more good men than evil, and while the latter cannot be persuaded to the path of righteousness by propaganda, they can certainly be corrected by good men with rifles*." — *Jeff Cooper, The Art of the Rifle*

This Chapter discusses the historical background on which the right to keep & bear arms grew as a means of popular resistance against tyranny in the American & Indian History. It is argued that since the advent of collective organisation of defensive units in early human history, communities themselves developed a right of collective self-defence by arming themselves against an oppressing state. As this right grew, the nature of the right grew from being a practice amongst communities to a duty in common good. In this light, the first section discusses the various traditions of the American World in which the right to keep arms grew as a custom, i.e., Anglican Traditions, American-Machiavelli Traditions, Anglo-American Natural Law Traditions, Anglo-American Customary Law Traditions, & Native American Customary law tradition. The second section discusses argues how a customary right to keep weapons has developed out of experiences of resisting subordination and oppression at the hands of invaders and conquerors in India and how Race and Communal identities of certain cultures, such as the Sikhs and Kodavas have transposed a right to resist tyranny into a protected freedom to own arms.

SECTION A

CUSTOMARY RIGHT TO KEEP ARMS IN AMERICAN TRADITIONS

The Anglican import of a tradition of 'calling-for-arms'

Scholar Stuart R Hays,[16] discusses at great length the Anglican tradition in which a culture of arming and disarming the subjects by the sovereigns. It is observed that the early tribal alliances on the island of Britainnia, each bonded by a family kinship group called 'Kindred' not only possessed weapons for waging war and self-defence, but also as an identity marker to their 'blood-relation' to ancient heroes of the Anglo-Saxon history.[17] This identity soon grew into a feudal custom to keep oneself armed for their tribe. The customary law was such that in case of a homicide of a tribesman of one kindred by another, "*revenge for death involved the entire kindred of each party involved in the homicide. This bloody form of revenge lasted until it became the custom (law) to "purchase revenge" and thus limit the combatants to those originally wronged and not to cousins several times removed*."[18] The custom further grew into two further categories of norms, one was that of self-defence of tribes, wherein the tribesman within kindred could opt out of a revenge plot and thus, self-defence was isolated to concern only the wronged party. On the other length the custom grew into a 'feudal obligation,' for instance, in the long-standing tale of 'King Arthur,' the norms established by his 'Round Table,' made it a duty for the lowest rung of kindred tribesman called 'ceorl' to serve their masters by

[16] *Id.*
[17] J. A. GILES D.C.L., ANGLO-SAXON CHRONICLE (449 A.D.), (G Bell & Sons. Ltd. 1914).
[18] Stuart R. Hays, *The Right to Keep Arms, A Study in Judicial Misinterpretation* 384-385.

providing armament production and military service. This custom of the kindred to claim self-defence by seeking revenge from the attacker by calling the tribesman to pick-up arms, evolved into the laws of *assizes.* The laws of assizes, such as the Assize of Arms of Henry II (1181), were decrees issued by medieval monarchs which obligated "*every freeman to keep arms suited to his station in life, and to be prepared to fight for the common defence and the king*."[19] It can be observed that, since the usurpation of the English monarchy by the Normans, there was growing 'xenophobia' amongst the Anglo-Saxons to separate themselves from the 'conqueror's' administration. This feeling of distrust against an alien monarch, drove the right to keep arms of the kindred from being a customary right into a customary duty. This custom was thereafter codified into law by §. 61 of the Magna Carta (1215), that provided the right of the subject barons to correct the King 'by force' should he fail to follow the other provisions of the Charter. However, a shift in the adoption of this customary law evolves into a practice of exclusionary rights by later centuries owing to political motivations and the breakaway of the English Church from Rome. Thus, in Bill of Rights of 1688, while the Right to keep arms is continued to be protected it is done at the specific exclusion of all communities except those identifying as Protestants. Moreover, while we see that the Right to keep arms had indeed achieved the force of Customary Law in the Anglican tradition, however, its codification resulted in selective disarming of minorities. It is also noteworthy to observe, that it is this this precise customary right that was extended to the Commonwealth settler colonies that landed in the Americas in 1601, thus, found a way into the American tradition.[20]

Machiavellian Tradition and the American right to resist tyranny:

The idea of keeping arms for self-defence against a tyrannical state, was birthed in the Florentine tradition, millennia ago, minted in the works of some such as Machiavelli. He contested that the protection of the republic could only be possible if there existed a citizen warrior. Machiavelli argued that building economic sufficiency of the people and their preparing them as soldiers was the most reliable safeguard against corruption. This idea developed a sociology of liberty which underlined the need for arms in the society. The idea further promoted the development of a political environment that permits arms to its gentry, promotion of the societal norms that oblige the citizens to be prepared to fight for the republic and provisions for citizen-soldiers to find a home and occupation outside their military service.[21] Machiavelli believed that the creation of a standing army by the state, was in itself a threat to constitutional liberties, for that allowed for the state to behave tyrannically, thus creating scope for massive infringement of constitutional rights.

This thought flowed into the minds of the American Constitution makers as well.[22] Thus, it was believed by the founding fathers that if tyranny was ever fielded by the state, especially by the executive, it would be channelled through the application and usage of a national army. Numerous of the Founding Fathers held the notion that a Head of State, could be easily swayed to deploy a standing army recklessly in pursuit of power and imperial glory, resulting in fiscal

[19] *Id*.
[20] *Id*.
[21] J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (Princeton University Press 1975).
[22] THE COMPLETE ANTI-FEDERALIST 164 (Herbert J. Storing, ed. 1981) (statement by Pennsylvania minority); *See also* Brutus II, NEW YORK JOURNAL (Nov. 1, 1787) "*as standing armies in time of peace are dangerous, they are not to be kept up*;" 3 ELLIOT'S DEBATES, 380 "*But when once a standing army is established in any country, the people lose their liberty*." (statement of George Mason at Virginia ratifying convention).

insolvency and military vulnerability. To counteract this, they posited that a citizen militia would be less inclined to engage in such adventurism. This was due to two primary reasons: *Firstly*, any endeavour to mobilise the militia for non-emergency purposes would face robust opposition from the populace; & *Secondly,* since militia units were state-based, as opposed to national, summoning them would mandate the cooperation of state governors or enable the governors to challenge the President's decision to initiate warfare.[23] The Seven Years' War provided a noteworthy example of how the militia served as a means of local resistance to imperial warfare. During the conflict, various militia units throughout New England refused to heed the Crown's call to serve, an act of disobedience that was supported in Connecticut by the colonial governor himself.[24] By compelling the federal government to rely on state militias, the Founders' principle of checks and balances would have been ideally upheld. The proponents of this thought were however met with severe criticism. The delegates, many of whom had fought in the Revolutionary War, recognised that in the event of war with a European power, a professional army would almost certainly be needed.[25] The very characteristics that made the militia attractive from the point of view of democratic theory posed serious liabilities from the point of view of military efficacy: unprofessionalism, regional non-uniformity, strong ties to their home communities, and even local control.[26] This created within the mind of the founders, a duopoly wherein even though keeping the army was a threat to the republic, it's existence must be guaranteed to allow for the protection of such a republic. However, the founders argued that to counteract as well as to create a system of checks and balances against the overreaching power of the executive, wielded by the military, it was necessary to established a well-armed and able militia. This would allow for a mitigation of the risk associated with the presence of a standing army in two ways; *firstly*, the very presence of a capable militia would reduce the federal government to raise an army, "*as the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good militia*."[27] *Secondly*, if there was during the rarest of cases, terrible overreach by the state wherein it exceeded its constitutional boundaries, then this exact militia could be called upon to protect against such a tyrannical state. Madison even states that the very presence of such a militia can act as a deterrent to a tyrannical state.[28] He argues that it is conceivable that only a small portion of the total population capable of bearing arms and rendering military service would form a central standing army. In juxtaposition, the States militias which are formed out of the local population, would provide for a much larger force of armed men, commanded by officers designated from their own ranks, fighting for their shared freedoms of their respective states and town, and led by governments that possess their trust and affections. "*Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.*"[29]

[23] David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 Michigan Law Review 588 (2000).
[24] Gordon Wood, *The Radicalism of the American Revolution* 163-64 (1992).
[25] THE FEDERALIST No. 26, 170 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
[26] THE FEDERALIST No. 29, 183 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *See also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 329 (Max Farrand ed., 1911).
[27] *Id.*
[28] THE FEDERALIST No. 46, 299 (James Madison) (Clinton Rossiter ed., 1961).
[29] *Id.*

Thus, in the American-Machiavelli tradition, the right to keep arms was viewed as customary right to resist tyranny of the State using its military raising capacity.

Anglo-American Customary Positive Law tradition (collective v. individual rights distinction):

The predominant scholarship as it exists today, confirms that the right to keep arms exists as a customary positive law under the Anglo-American tradition.[30] To this end, some scholars argue that certain fundamental rights where pre-established through the social-contracts and could be identified throughs customs, thereby not requiring any enumerations in a Constitution.[31]. These rights were articulated as "*Simple acknowledged principles."*[32] However, bearing the importance for establishing new rules, e.g. the Establishment Clause, there arose a need to codify certain rights that had already been determined at common law. To this end, the need for codification of the right to keep in the constitution was supported by the fact that "*if a legislature authorized executive officials to arbitrarily disarm the citizenry, as English Kings had done in the seventeenth century, that legislation would abridge a customary positive right*."[33] One 19th century decision of a US Court shed some light on the logic of what the nature of the customary right was: in *Aymette v. State of Tennessee*, 1840,[34] the Tennessee Supreme Court interpreted the right to keep arms under the Tennessee State Constitution in light of "*the state of things in the history of our ancestors*."[35] To this end the court applies the famous common law rule of interpretation known as the 'mischief rule' to discern the meaning of the right. The court held that, bearing from the historical significance of the use Militia Acts of 1662 by Charles II, the founders of America, enumerated a customary positive right that offered protection solely against arbitrary disarmaments of the subjects. Thus, the extent of the rights was limited in so far as the State imposed mala fide and discriminatory laws that disarmed its citizens. The court viewed the right being grounded "*on a concern about self-rule—not a libertarian notion of freedom from any legal restraint."*[36] As such the right to 'keep' arms was, narrowed down to a collective right in custom, this collective right was necessarily limited in relation to service of militia. To this end the court, held that "*those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin*," were not protected by the scope of the right. In similar spirit, the SCOTUS in its (now overruled) decision of *Presser v. Illinois,*[37] reviewed a law prohibiting "*bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law*." In this context, the court held that the right to keep arms was only in the context of militia service. However, as noted by Justice Scalia during the oral arguments in *District of Columbia v. Heller,*[38] the Congress, under its 'Militia Clause'[39] had

[30] STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT.
[31] Jud Campbell, *Judicial Review and the Enumeration of Rights*, GEO. J.L. & PUB. POL'Y 569, 576–578 (2017).
[32] Statement of James Madison (Aug. 15, 1789), in 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1270, 1270 (Charlene Bangs Bickford et al. eds., 1992).
[33] Jud Campbell, *Natural Rights, Positive Rights, and The Right To Keep and Keep Arms* 40; See Joyce Lee Malcolm, *To Keep And Bear Arms: The Origins Of An Anglo-American Right* 105, 115–16 (1994).
[34] Aymette v. State of Tennessee, 21 Tenn. 154 (1840).
[35] The Constitution of Tennessee, provides a right to keep arms in the following terms, "*the free white men of this State have a right to keep and bear arms for their common defence*."
[36] Jud Campbell, *Natural Rights, Positive Rights, and The Right To Keep and Keep Arms* 43.
[37] Presser v. Illinois, 116 U. S. 252 (1886)
[38] District of Columbia v. Heller, 128 S. Ct. 2783 (2008).
[39] U.S. CONST. art. 1, § 8 cl. 16.

unlimited power to take over all state militias to organise, train and discipline them.[40] That being the case, it would have been fairly possible for Congress to virtually divest all militia out of states. Precisely to avert this fear it was clarified by the founding framers that states have a concurrent power arising from pre-constitutional positive law to enable them to raise militia.[41] This was precisely, why the second amendment was adopted, such that the customary right to collective raising of arms was permitted to states.

Notwithstanding the collective right (in relation to militia), it is also important to note, the expression "the right of the people" in the Second Amendment, also connoted an individual right to "keep" arms. It is argued that with the reforms post the American Civil war, even this individual right had attained a customary positive law status. In the decision of *Heller,* the court faced with interpretations of the second amendment advanced over numerous precedents: (a) Individual has a right to possess firearms subject to limited governmental regulation; (b) Individual has a right to bear arms only in connection to military service subject to service rules; (c) It is the State's right to create a militia and arm it with whatever weapons it can lawfully. In the course of the discussion Justice Scalia adopted a linguistic analysis of the framing of the right under the Constitution.[42] He observed that the opening phrase, "*a well-regulated Militia, being necessary to ... a free State*;" provides a mere purpose for the origin of the right, however, this may be detached from the subsequent phrase "*the right of the people to keep and bear Arms, shall not be infringed*;"[43] which is an operative clause on its own. Here he explains that 'people' in that sense is a reference to each individual severally and not as a collective. English grammar in settler colonies often underwent its own additions, where people although being a collective noun, may have been used distinctly in its singular and plural forms, i.e. people and peoples.[44] Furthermore, the terms "to keep and bear arms," are two different claims, that is to keep arm as to own them and bear arms as to carry them. Arms in its originalistic meaning would mean any weapon and not merely those requiring only for the militia.[45] Moreover, the majority also placed a historical context to the right itself, wherein, they drew parallels to the codification of the First and Fourth amendment, which were also a codification of a 'pre-existing right.'[46]

The decision in *Heller,* sheds' some light on the meaning of 'keeping arms.' The courts refer to the dictionary meaning of 'to keep,' which means "to hold; to retain in one's power or possession; to have in custody for security of preservation."[47] William Blackstone opines that in context of Catholics convicted for not attending service in the Church of England, suffered certain penalties, one of which was that they were not permitted to "*keep arms in their houses*."[48] During the framing conventions of the Constitution, Samuel Adams' proposed in the Massachusetts convention "*that the said Constitution be never construed to authorise Congress… to prevent the people of the United States, who are peaceable Citizens, from*

[40] Houston v. Moore, 18 U.S. (5 Wheat.) 1, 16 (1820).
[41] 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1307, 1308 (statements of John Marshall), (John P. Kaminski et al. eds., 2000).
[42] *Heller* 579-588.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] Noah Webster, *"keep," in* AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)
[48] 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 55 (1769).

keeping their own arms…"[49] It may be argued that to 'keep arms' owing to the reference of a militia, should mean 'holding arms in a communal military arsenal.'[50] However, a historical reading of the various nomenclature shows that, whenever state-owned arms having been kept in a public arsenal where referred the formal nomenclature had been the term 'deposit,' instead of 'keep.' For instance, Stephen Halbrook, notes[51] that in a Georgia 'Indian violence' Act of 1789, the law provided that upon discharge of troops, the soldiers shall 'deposit' their arms in a public storehouse.[52] Justice Scalia, in his decision in *Heller,* takes considerable objection to the petitioner's contention that since, a majority of the Settler State laws of at the founding moment specifically required the militia members to "keep" arms in connection with militia service,[53] hence, the phrase "keep Arms" has a militia-related connotation. Justice Scalia then argues that "*This is rather like saying that, since there are many statutes that authorize aggrieved employees to "file complaints" with federal agencies, the phrase "file complaints" has an employment-related connotation. "Keep arms" was simply a common way of referring to possessing arms, for militiamen and everyone else*."[54] Thus, the most certain meaning of "keep arms" in the Second Amendment is for an individual (regardless of militia) to "have weapons."

Speaking for the majority in *Heller,* Justice Scalia recounted the need for the emergence of such a right in positive law arising from the century's old history of abuses by the Stuart Kings who would strategically disarm the political dissidents under their absolute monarchies.[55] Even under the rule of King George III, the American Colonists were disarmed by the British administrations to restrict this right to only Englishmen who are citizens in Britain and not those were raised in the Americas.[56] The majority thus, finds that "*history shows that the way tyrants had eliminated a militia ... was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents*."[57] To that extent, it may be understood that having a state militia was only one of the ends for the sovereign colonies, however, this end would not be met without the means of allowing an indiscriminate right with every free individual to have weapons. *Per Contra*., the dissents argues that the purpose may have been to simply prevent another onslaught by the Colonial oppressors to regain the lost colony after the American War for Independence. The majority responds to this by portraying how disarming individuals discriminatorily was also worked around by several Confederate states to restrict the liberty of newly freedmen after the American Civil War.[58] To this end, the 1866 Freedmen's Bureau Act, guaranteed constitutional guarantee to all erstwhile enslaved individuals the Right to bear arms, "*without respect to race or colour, or previous condition of servitude...*" The intent of the Congressmen who passed the

[49] 6 JOHN KAMINSKI AND GASPARE J. SALADINO (Eds.), DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1453 (Madison: State Historical Society of Wisconsin, 2000).
[50] GARRY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT 258-259 (Simon & Schuster, 1999).
[51] STEPHEN P. HALBROOK, *What does the Second Amendment Say,* 327.
[52] H. MARBURY & W. A. CRAWFORD (Eds.), DIGEST OF THE LAWS OF THE STATE OF GEORGIA 263 (1802).
[53] 3 A COMPLETE COLLECTION OF STATE-TRIALS 185 (1719), "*Hath not every Subject power to keep Arms, as well as Servants in his House for defence of his Person?*"
[54] *Heller* 583.
[55] *Id, Heller.*
[56] STEPHEN P. HALBROOK, *The Fundamental Right to Bear Arms at the American Founding (1607-1824), in* THE RIGHT TO BEAR ARMS 137 (Post Hill Press, 2021).
[57] *Id,* 598.
[58] John W. Blassingame & John R. Mckivigan, *In what new skin will the old snake come forth,* 4 The Fredrick Douglas Papers 84 (1991).

Civil Rights Act and the Freedmen's Bureau Act, also resonated with a few members of the Judiciary as well. In Mississippi, in an 1866 case before Judge R. Bullock of the highest court of the state, accused Wash Lowe and few other freedmen, were acquitted for possessing firearms without a license. Although in that period a bench presided by CJ. Alaxander Hamilton Handy, declared the federal Civil Rights Act as unconstitutional and paved a way for the enforcement of a state law that made the keeping of arms by 'coloured-men' a misdemeanour. However, Judge Bullock, nevertheless held that such a law as itself unconstitutional for violating the personal right of the freedmen– a right of self-preservation.[59]

In substance what is declared is not just that the right to 'keep' arms is a customary-positive right, that grants complete freedom in the hands of individuals, at the same time, it also acted as tool for resistance and a guarantee against the political act of disarming the politically and socially weaker community.[60]

Native American Customary Law Tradition:

It has been held that the Native American Tribes where never formally brought under the US Constitution[61] and as such the 2nd Amendment does not extend to them. It has been argued that under the current American constitutional framework, the native American reservations are the only Governments that can completely prohibit or extinguish the right to bear arms in their Jurisdiction.[62] The historical narrative around native tribes has been that the Indian tribes are perceived to have existed in culture of 'savagery' and therefore, no right to self-preservation using arms can be extended to them.[63] Rather, Native Americans invasions where the hallmark for granting a right to keep arms to the white communities.[64] Conditioned on the discovery of the new world, the settler colonies employed a series of negotiations and alliances with Native Tribes.[65] In wake of these alliances, colonies (e.g. Carolinas) armed its native American allies with fire power to oppose the French armies and other hostile tribes.[66] However, despite this several native American tribes had a customary duty of adopting a martial class life. To no surprise, despite not being citizens of the United States until 1924, about 12,000 Native Americans enlisted in the Army during WW1.[67] It is said that "*the American Indian culture is a tradition of warriors, and Native American Indians still today have the highest record of military service per capita than any other ethnic group in the United States*."[68]

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[59] *Mississippi… The Civil Rights Bill Declared Unconstitutional by a State Court,* NEW YORK TIMES (Oct. 26, 1866).
[60] STEPHEN P. HALBROOK, *What does the Second Amendment Say, in* The FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 326-327 (2008).
[61] Talton v. Mayes, 163 U.S. 376, 384 (1896).
[62] Angela R. Riley, *Indians, and Guns*, 100 Georgetown L.J. 5 (2012).
[63] Ann E. Tweedy, "*Hostile Indian Tribes ... Outlaws, Wolves, ... Bears ... Grizzlies and Things like That?" How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defence*, 13 PA. J. CONST. L. 687 (2011)
[64] Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 324–26 (1991)
[65] E.B. O'Callaghan, *Deed in Trust from Three of the Five Nations of Indians to the King, Sept. 14, 1726, in* 5 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 800–01(Albany, Weed, Parsons, and Co. 1885)
[66] CLAYTON E. CRAMER, ARMED AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE 44 (2006).
[67] Tech. Sgt Barbara Plante, *Native American, a tradition of warriors*, 944TH FIGHTER WING PUBLIC AFFAIRS (Nov. 13, 2012) https://www.944fw.afrc.af.mil/News/Article-Display/Article/189562/native-american-a-tradition-of-warriors/
[68] *Id.*

In a 1945 article, D.E. Worcester details about the various arms owned by the native American tribes.[69] In particular, several southern Indian tribes have been described as being "*ready for war at any time, and extremely skilful in combat*."[70] Some of the early Teya Indian (Hasinai) tribes, used bow and arrow as means of navigation and water sustenance.[71] By the 18th century the most popular symbol of Native American, 'The Tomahawk' became a known weapon for the Natives as well as the colonist. Today, weapons like the tomahawk have not only become a culture symbol but also a sport.[72]

Firearms in particular, have also become part of the native American arm culture. It has been argued that firearms, gained particular appeal and traction amongst the native Americans as means of traded goods with the settler colonies in exchange for land and Bisons.[73] It is also observed that "*[Tribes] found guns not only gave them a psychological advantage over their tribal enemies who lacked them, but were useful in hunting…*"[74] Firearms grant was also acknowledged a means compensation for destroyed livelihoods for the Indian Tribes, for instance, with the passage of the Indian Removal Act, 1830, several tribal members were given rifles in return for the forceful acquisition of their settlements by the United States administration.[75]

Some of the present-day tribal codes, such as that of the *Cherokee Nation,* codified the right to keep arms such as knives and other blades, for hunting, fishing, or recreational purposes.[76] Similarly, the Muscogee Code, does not make it unlawful to keep any form of arms for hunting games etc. and only a licence based restriction is in place for carrying weapons in public.[77] Some of these codes even include limitations on the owning of traditional weapons such as bow and arrows.[78]

Thus, it is submitted that be that the native American tribes, severally, protect their long-standing customs of owning traditional weapons and firearms that closely reflect the "*rural nature of many reservations and the deep cultural links to a subsistence lifestyle*."[79]

[69] Worcester, D. E., *The Weapons of American Indians*, New Mexico Historical Review 20, 3 (1945).
[70] T. H. Lewis and F. W. Hodge, *Spanish Explorers in the southern United States*, 148-149 (New York, 1907).
[71] *Id,* one anecdote from Spanish conquerors describes one such practice as "*From the Teyas the Spaniards learned a novel way to keep on the right course when crossing the trackless plains. At sunrise, the Indians selected the route they intended to travel to the next waterhole, and then shot an arrow in that direction. Before reaching this arrow, they shot another over it, and in this way continued all day long without getting off their course because of the absence of landmarks*."
[72] BLACKIE COLLINS, KNIFE THROWING-SPORT – SURVIVAL – DEFENCE (Knife World Publications, 1978).
[73] ALFRED A. CAVE, THE PEQUOT WAR 63 (1996).
[74] CHARLES G. WORMAN, GUNSMOKE AND SADDLE LEATHER: FIREARMS IN THE NINETEENTH-CENTURY AMERICAN WEST 435 (2005).
[75] *Id,* 216.
[76] CHEROKEE NATION FIREARMS ACT, 1971.
[77] MUSCOGEE (CREEK) NATION CODE, 2010.
[78] BAY MILLS TRIBAL CODE tit. XVI, § 1614.
[79] Angela R. Riley, *Indians, and Guns* 1727.

SECTION B

RIGHT TO 'KEEP ARMS' AS A 'CUSTOM OR USAGE' IN INDIA

India's history in development of a right to resist Tyranny using Arms

No other region in the world unlike India, has faced years of armed insurrections, pillaging, looting and territorial conquests. It was essential to hoard weapons en masse against foreign invasion, and were often touted as necessary tools to prevent the wrath of foreign invasion against, culture, religion, nation, and family. Even when Alexander, The Great, invaded then India as long back as 327 BCE, he had to contend with the armed citizenry of the *Janapada* republics and the monarchies, leading to his eventual defeat and retreat.[80] This was all because of centuries of weapons and 67 arms training bestowed upon the common population thru the *Gurukul* system. This system, eventually destroyed by the British, consisted on an essential subject namely *Dhanurveda* or the science of archery and weapons.[81] It was not a theoretical subject, but recent historical elevations have also showcased, that rather it was considered to be a *Upaveda* or a derivative of applied sciences.[82] In one of the most revered treatises in Indian history, *Manubhashya*, Acharya Medhatithi points out *"…that a Kshatriya [warrior class of men in the Indian Society] is to live by bearing weapons, but common people are also permitted to bear arms for self-protection. The King's arms cannot reach all men, and that there are some wicked men who attack the most valiant of the king's officers, but are afraid of persons bearing arms.*"[83] Furthermore, during the Mauryan era, renowned treatise on public law and administration, *The Arthashastra* provided for a universal liberty to be armed, but also provided for a regulation against its public carry.[84] Under *Arthashastra,* arming the gentry secretly within an enemy state under oligarchic rulers, was established as a military strategy of a state, and to that extent, such gentry upon being conquered are accorded the right to retain the arms received by them.[85] From this arose formation ethnic clan-based families (some of who exist till date), such as the *Kambojas* & *Surashtras*, who "*practised agriculture, cattle-rearing and trade but are also trained troops ready to take up arms when necessary*."[86]

Medieval Indian society, both urban and agrarian, was to some extent an armed society. In cities and towns, the elite carried swords like walking sticks. In villages few men were without at least a spear or bow and arrows, and they were skilled in the use of these arms. In 1632, Peter Mundy actually saw in the present-day Kanpur district, labourers with their guns, swords and bucklers lying by them while they ploughed the ground.[87] Similarly, Manucci described how, throughout Emperor Akbar's reign, the inhabitants in the Mathura region safeguarded themselves against Mughal tax hoarders. The womenfolk stood equipped with lances and arrows. When a husband ablaze his matchlock, his wife handed him a bayonet and reloaded the matchlock. The countryside was scattered with small forts, which served as headquarters for a

[80] V.D. SAVARKAR, SIX GLORIOUS EPOCHS OF INDIAN HISTORY (1971).
[81] PURNIMA RAY, VASISHTA'S DHANURVEDASAMHITA (2003).
[82] *Id.*
[83] 5 GANGANATH JHA (ED.), MANUSMRITI WITH THE BHASHYA OF MEDHATITHI, verses 8.348-349 (Calcutta University Press 1932).
[84] L.N. RANGARAJAN (ED.), THE ARTHASHASTRA 407 (Penguin 1992), verse 5.3.38 states, "*No one shall move about carrying arms, unless they have a special permit, with the proper seal*."
[85] *Id,* verses 11.1.15,53.
[86] *Id,* 945.
[87] SIR JOHN STRACHEY, INDIA: ITS ADMINISTRATION AND PROGRESS 126 (London: Macmillan & Co. Ltd. 1901).

longstanding custom of rebellion and agrarian strife. Armed farmers reinforced assemblies such as the *Baheliyas, Bhadauriyas, Bachgotis, Mandahars,* and *Tomars* in the earlier period, and the *Jats, Marathas,* and *Sikhs* in the later period. These communities collectively developed a tradition of keeping weapons in their homes and thus, came to be designated as a 'martial race' under the British years to come.[88]

Due to such a culture of resistance, despotic Mughal Emperor Aurangzeb in 1695 decreed disarmament procedures of ethnic Indians, which posited "*all the Hindus, with the exception of the Rajput's, were forbidden to travel in palkis, or ride on elephants or thorough-bred horses, or to carry arm*."[89] This showcased as to how essential was the practice of hoarding weapons by the then Indic population, for all invaders, had made it their sole purpose to disarm the local Indic population fearing revolt against tyranny. This hoarding of weapons was largely, as argued above, is consequently found in Hindu socio-religious thoughts and culture, as is evident from festivals celebrated even to-date, such as *Shashtrapooja* on *Vijayadashami* and the weapons homage offered to war deities such as Kartikeya & Durga.[90]

Customary Right of keeping arms in present day communities

Bearing from the historical traditions several communities and tribes continue to preserve their right to keep arms till date. The most prominent of them is the Sikh Community. Sikhism, constitutes to be the fourth largest religious community in the world. The sect was founded by its first *Guru*, Sh. Nanak Dev ji, and was continued in tradition throughout medieval history of India but 8 other subsequent *Gurus*. The 10th *Guru* however, was proclaimed to be not a person but a treatise on the fundamentals of the *Sikhi* faith, known as the *Gurugranth Sahib.*[91] Among the fundamental tenets of the Sikh Community, one of the principles is the mandatory keeping of a short dagger called *Kirpan.* Unlike other religious communities who revere a book, the *Gurugrantha Sahib* does not reveal keeping of Kirpan as new practice, rather, it offers recognition to the practice of earlier tribesmen of Punjab to wield a short-sword to resist the oppressive governance under the Mughals. Thus, keeping a *Kirpan,* unlike a mere religious symbol, is a customary practice of keeping arms of already existing tribes who joined the fold of Sikhism.[92] The word "*Kirpan*" is morph of two Punjabi words '*Kirpa'* meaning a favour, and 'Aan' meaning honour.[93] Within Sikh vernacular the word carries a two-dimensional connotation, *Firstly*, *Bhagauti* (Sword) is a prenominal appellation of the Lord, and hence, its bearer believes that they are always under the security of the *Bhagauti*. *Secondly*, it is a symbolic manifestation of the power, that may only be employed to fulfil righteousness against the sinful as a final recourse when all measures fail. Thus, *Kirpan,* being an essential tenet of the *Khalsa order* of Sikh is an undying exhibition of the right to resist tyranny.[94] To that extent, it is argued that the degree to which a Sikh has the freedom to own arms unswervingly echoes the degree sovereignty they possess over themselves. Being part of the *Khalsa* brotherhood, a Sikh is devoted to reject any exterior restraints on their customary liberties. As such, they are

[88] 1 TARA CHAND, HISTORY OF FREEDOM MOVEMENT IN INDIA 121 (1961).
[89] SIR JADUNATH SARKAR, MAASIR-I-ALAMGIRI 370 (Manohar, *republished* 2022).
[90] These practices are also adhered to in the household of the Authors as well.
[91] *Who are Sikhs? What is Sikhism?* SIKH NET (Accessed on Mar. 20, 2024), https://www.sikhnet.com/pages/who-are-sikhs-what-is-sikhism
[92] 1 Dr. Kirpal, History of the Sikhs, and their Religion, 1469-1708 (2004).
[93] *Id.*
[94] *Id.*

obliged to avow and struggle for their unobstructed right to keep arms for both offense and defence.

In fact, this struggle to resist obstruction on their right to keep arms has been historically consistent from the Mughals to the enactment of the Arms Act, 1878, under the British Raj. The resistance was long and arduous, culminating into a nonviolent movement, the *Kirpan Morcha*. In wake of the movement, thousands of Sikhs were detained for contravening the Indian Arms Act. The British even engaged in raiding of *Kirpan* factories and arresting its promoters. The peaceful Sikhs carrying Kirpans however, resisted with stoic resilience and unwavering faith against the extreme torture and other excesses by the Punjab Government. Such Sikhs were conferred with the championship of *Kirpan Bahadur* (Hero of the Kirpan). In 1922, after a long struggle, a concession was brokered between the Governor of Punjab and the *Shiromani Gurdwara Parbandhak* Committee (the governing body of Sikhs in India), which resulted in a proclamation that no Sikh will be prosecuted for keeping the *Kirpan*.[95] Furthermore, this led to establishment of a further norm for self-restraint upon the wielders, that the Kirpan "*may be unsheathed and drawn out only for prayers (ardds), initiatory ceremonies (amrit prachdr), and by the Five Beloved (Panj Piare) leading a religious march*."[96] Thus, the custom of wearing the Kirpan has attained a customary significance portraying self-autonomy and restrain.

Even during the Constituent Assembly debates, one member, Harnam Singh's draft on fundamental rights provided for an exception for Sikhs to keep *Kirpan* under the right to assemble peacefully without arms. However, this was later incorporated under the Article guaranteeing freedom of conscience.[97] To that end, the explanation to Article 25 of the Indian Constitution provides, "*the wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion*." Moreover, the Government of India, being sensitive to the customary practice of Sikhs, exempts any licenses for manufacture or owning of *Kirpans.*[98] Such a customary liberty to wield a non-lethal arm, such as *Kirpan,* has also been affirmed by the Indian Judiciary, where a restraint order against keeping a Kirpan in the Court hall was quashed.[99]

Similarly, The Kodava community in Coorg district of Karnataka, are the only community in India, who are exempt for any firearm license requirements for their region, by virtue of race and custom. While it has been recorded that the Kodava community, customarily bore rifles, much before the British Annexation of India, during the British administration in 1861, the Kodavas came to be identified as a martial race bearing important offices in army and police.[100] The Kodavas possess specialized knowledge in manufacturing indigenous firearms known as Tiritoku and Tithunnde (an explosive fireball) with resources obtained from local woodlands. These armaments have gained an integral respect within Kodava customs for over 5 centuries, such that even today no festival or ceremony is complete with the use of these arms. They also celebrate a particular festival, called *Kalipodh*, which is an occasion dedicated to the worship

[95] *Kirpan Morcha,* THE SIKH ENCYCLOPAEDIA (Accessed on 24.05.2024) https://www.thesikhencyclopedia.com/historical-events-in-sikh-history/the-british-and-sikhs-1849-1947/kirpan-morcha/
[96] *Id.*
[97] 2 B. SHIVA RAO, FRAMING OF INDIA'S CONSTITUTION (1967).
[98] The Indian Arms Act, 1959, § 4, r/w Schedule II.
[99] Dilawar Singh v. State Of Haryana, AIR 2016 P& H 149.
[100] M.N. Srinivas, Religion and Society among the Coorgs of South India (1952).

of these arms by the community.[101] The Indian court in a recent decision of *Capt. Chethan Y.K v Union of India,*[102] it was observed that, within Article 13 of the Constitution, law includes 'custom or usage.' The Kodava community's custom of possessing firearms without any restriction, is thus, equivalent to a law. As such, this customary law, does not violate the right to equality vis-à-vis the general population, as the Kodavas have displayed a unique tradition that is dying as their population reduces and that it is in public interest that their community receives an exemption in this regard. To this end, even the Central Govt. vide its notification under the Arms Act, have time to time extended exemption against any firearm regulation for this community.[103]

Thus, there exists standing precedent that in the interest of a 'custom or usage' that is essential to the identity of a community, a culture of possessing weapons can be deemed to have a protected status as a fundamental right.

SECTION C

SUMMARY

This chapter argues that the right to 'Keep Arms' in the constitutional jurisprudence of the United States, and to a lesser extent in India, originated from the tradition of clansmen arming themselves against conquerors. This practice was embraced by libertarians and social groups seeking limited state interference in self-preservation against tyranny. In the U.S., unlike in India, this custom evolved into a secular culture rather than remaining a religious right. In India, the right to bear arms was largely seen as religious tolerance, especially for communities like Sikhs and Kodavas. This difference stemmed from India's commitment to non-violence during its independence, contrasted with the U.S.'s revolutionary origins and ongoing fears of reconquest. The colonial classification of martial and non-martial races in India further complicated the right to bear arms, stigmatizing certain communities while others, such as Hindus, abandoned similar customs to integrate into the general population. In the U.S., the right to keep arms, seen as a fundamental freedom and tool for resistance, is protected uniformly across different legal instruments. In India, only Sikhs have a constitutionally protected right to bear arms, while Kodavas' exemptions are subject to executive discretion and could be revoked. The chapter concludes that recognizing the right to bear arms as a customary right for all communities would foster a secular environment where each community respects others' arm-bearing traditions. This would promote societal homogeneity, transforming weapons from symbols of violence to symbols of sovereignty and patriotism.

[101] *As Home Ministry Upholds Kodavas' Ancient Right To Bear Arms, Here's Why The Order Is So Significant,* SWARAJYA MAG (accessed 22.05.2024) https://swarajyamag.com/news-brief/as-home-ministry-upholds-kodavas-ancient-right-to-bear-arms-heres-why-the-order-is-so-significant

[102] Capt. Chethan Y.K. v. Union of India, Writ Petition No. 11948/2021 (GM-RES-PIL). (Karnataka High Court)

[103] S.O. 1920, 1963, Ministry of Home Affairs, Government of India, Notification under Section 41 of the Arms Act, 1959, (extended until 2029, as on 29 Oct. 2019).

CHAPTER III
RIGHT TO 'BEAR' ARMS: A CIVIL LIBERTY

This chapter discusses how the right to carry arms can be understood as a civil liberty. To that extent the first section discusses how a right to self-preservation has attained the respect of a protected right to carry weapons under American Law. Thereafter, it is discussed how, a claim to carry arms may be exerted as a protected liberty of expression and faith under the First Amendment of the US Constitution. The second section discusses how in India, the right to life and personal liberty per say does not protect the liberty to carry arms. It will be further discussed how the Indian Constitution drafters wantonly rejected a civil right to carry arms in the interest of maintaining law and order. Furthermore, it will be discussed how Indian courts have completely ignored any claim to equate the right to private defence with the statutory privilege to own weapons.

SECTION A

AMERICAN RIGHT TO 'BEAR ARMS': A CIVIL LIBERTY WITH REASONABLE RESTRICTION

The interpretation & scope of a Right to 'Bear' Arms:

In *Heller* Justice Scalia relies on a linguistic analysis to determine the meaning of 'bearing' arms under the Second Amendment. He notes that although in a literary context, to 'bear' means to carry, but when conjoined to a reference with 'arms,' bearing arms is an expression with a purpose to deal with confrontation.[104] To this end, he argues that the idiomatic meaning of the 'bear arms' cannot be isolated to 'wage war' or 'do military service,' as then a right to bear arms should mean a right to serve as a soldier, thereby leading to an absurd interpretation, not covered by the reach of the original provision.[105] In contrast, Justice Stevens for the dissent argues that the fact that,[106] one of the framers, James Madison proposed the inclusion of a 'conscientious-objector clause' to the second Amendment, that provided that "*no person religiously scrupulous of bearing arms, shall be compelled to render military service in person*,"[107] this suggests that the original reference to the right was not a civil liberty with individual, rather a collective right of states to organize military service. The dissent also points out that to 'keep and bear' is a singular right and must be viewed as a 'term of art' e.g. 'cease and desist' & 'hue & cry.' However, both these arguments failed, for Justice Scalia argues that placing reliance on a deleted provision to draw the meaning of a provision that was retained is not a persuasive argument. As discussed earlier the meaning of the right is not one but two rights as had been followed in the first Amendment as well. For e.g. *right [singular] of the people peaceably to assemble, and to petition the Government for a redress of grievances*.[108]

The right to 'bear' arms as an American Civil Right:

It an established law that the Amendment guarantees "*the individual right to possess and carry weapons in case of confrontation.*"[109] This civil right existed for Americans beyond the scope

[104] Muscarello v. United States, 524 U. S. 125 (1998).
[105] *See* L. LEVY, ORIGINS OF THE BILL OF RIGHTS 135 (1999).
[106] *Heller* 636-645.
[107] H. VEIT, K. BOWLING, & C. BICKFORD EDS., CREATING THE BILL OF RIGHTS (1991).
[108] US CONST. I[ST] AMENDMENT.
[109] *Heller* 592.

of a militia service, including for self-defence, and hunting.[110] To this end, this civil right is viewed on three fronts, *Right to Self-defence, Right to Free Speech & Right to Religion.*

A. Civil right to Self-Defence:

In *McDonald v. City of Chicago*[111] the court held that, "*the right to self-defence is the central component of the second Amendment*." In *McDonald* respondents assail the constitutionality of a law similar to that in *Heller* in the State of Chicago. From a culmination of the scholarly writing and the Judgement in *McDonald,* the second amendment right is thus a fully incorporated right, thus, enforceable against the States and the Federal Protection alike. As *Brannon P. Denning & Glenn H. Reynolds* have argued, the decision has built Second Amendment as a domain of 'normal Constitutional Law.'[112] This incorporation of arms rights has not just been a judicial retention of the right, rather, as it has been argued elsewhere, there was a visible support for the right by a landslide margin in over 50 states of America, with a view of limited regulation required by the state of Gun-laws.[113] The judgement reviews the incorporation doctrine vis-à-vis the Second Amendment across two sections: through the Due Process clause or through the Privileges and immunity clause of the Fourteenth Amendment. Four of the nine judges tested "*whether right to bear arms is fundamental to our scheme of ordered liberty and system of justice*." In *Heller*, it was noted that during Reconstruction, there was a systematic effort to deny newly freed individuals their rights. Congress had to enact legislation to restore the right to bear arms for African Americans disarmed by Southern Jim Crow laws. Justice Alito argues that securing this right was symbolically important and served as a crucial defence against former owners trying to re-enslave African Americans post-Civil War.[114] In this spirit, Judgement also held that by the time the fourteenth amendment was ratified, "*the right to keep and bear arms was widely protected by state constitutions*, *that explicitly protected the right to keep and bear arms as an individual right to self-defence*."[115]

Richard L Aynes, arguing in the same vein as Justice Thomas, highlights a straightforward argument for incorporation through the privileges and immunity clause.[116] According to this argument, if right to bear arms was incorporated as a privilege and immunity in the hands of US citizens, then States are inversely barred from abridging that right. However, this was rejected by the other half of the majority who upheld the long-standing precedent in the *Slaughter-House cases,* that the state law may run independently through state constitutions unless it expressly nullifies a federal privilege in a federal domain, such as the right to vote in federal elections, right to access interstate connections, etc. however, the right to bear arms was could not be seen as a solely federal immunity or privilege, rather it had to be a much ingrained liberty existing within states severally and the federal constitution in addition.

The Supreme Court, in *NYSRPA v. Bruen*, reviewed a New York law requiring concealed carry license applicants to show "proper cause," meaning a need beyond that of the general public. The issue was whether denying these licenses for self-defense violated the Second Amendment.

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[110] *Heller* 598-599.
[111] McDonald v. Chicago, 561 U.S. 742, 767 (2010).
[112] Brannon P. Denning & Glenn H. Reynolds, *Five Takes on McDonald v. Chicago*, 26 Journal of Law and Politics 273 (2011).
[113] DAVID B. KOPEL, THE RIGHT TO ARMS IN THE LIVING CONSTITUTION (2010).
[114] *McDonald,* 1029.
[115] *McDonald*, 791.
[116] Richard L. Aynes, *McDonald v. Chicago, Self-Defence, the Right to Bear Arms, and the Future*, 2 (181) Akron Journal of Constitutional Law and Policy (2011).

The court noted the lack of a clear definition for "proper cause," with New York courts interpreting it as a unique need for self-protection.

The court ruled that New York's requirement violated the Fourteenth Amendment, as it prevented law-abiding citizens from exercising their Second Amendment rights. The court set a two-step test for firearm licensing laws: (a) whether modern and historical regulations impose a similar burden on self-defense rights, and (b) whether the regulatory burden is similarly justified. Finding no historical precedent for the "proper cause" standard, the court concluded that Manhattan's population density does not make it a sensitive area in its entirety.

However, it must be noted that the right to self-defence while protects a class of weapons under the second Amendment, it excludes another class from the framework. On this issue, the majority in *Heller*, refers to the decision of *United States v. Miller* (1939)[117] which upheld a federal conviction for transporting an unregistered short-barrelled shotgun. The court here held that "*in the absence of any evidence tending to show that possession or use of a 'shotgun . . .' at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument*." Scalia accurately asserts that the Miller test did not challenge the individual application of the right to bear arms but rather evaluated if the weapon itself was suitable for citizens to defend themselves. The court's focus was whether the weapon was appropriate for preserving this right in its contemporary context. The court excluded dangerous and unusual weapons, not typically owned by law-abiding citizens for lawful purposes, from Second Amendment protection. However, this has led to extensive litigation over defining what constitutes a dangerous or unusual weapon.

The court considers certain regulations reasonable under the Second Amendment, such as prohibitions on firearm possession by felons and the mentally ill, restrictions on carrying firearms in sensitive places, and conditions on the commercial sale of arms. Felons and the mentally ill are unlikely to contribute to the preservation of the right to bear arms and may threaten its lawful enjoyment by others. Sensitive areas like schools and government offices require security and sanctity, making self-defence with weapons inappropriate. Conditional licensing ensures public safety by holding individuals accountable for the fair use of their weapons. These limitations aim to allow everyone to exercise the right to bear arms securely and without threatening others' rights.

An anomaly arises: if the goal is to maintain a militia, shouldn't citizens have access to weapons used by a militia? Justice Scalia addresses this by noting that modern developments limiting the connection between the prefatory clause and the protected right do not change the interpretation of the right. The exclusion of dangerous or unusual weapons suggests that while citizens should be prepared to join a militia, this does not mean unrestricted access to military-grade weapons. In peacetime, such weapons are unnecessary for self-preservation and pose a threat or nuisance.

Thus, while the second Amendment case does not authoritatively say when a weapon stop being an unusual or dangerous weapon and safe for public access, an attempt has been made to strike a balance between individual freedoms and public safety. Quite similarly, in an Ohio Appeals court decision in *State v. Hardy* (1978),[118] though not concerning second amendment, an

[117] United States v. Miller, 307 U.S. 174.
[118] States v. Hardy, 60 Ohio App. 2d 325 (Ohio Ct. App. 1978).

accused was convicted for using a Gun registered to a third party in self-defence despite being ineligible for its use for the reason of mental incapacity. The Appeal court reversed the decision by finding that no inquiry was made into the plea of self-defence. The question then arises whether in such cases, a right to bear arms may be used for criminal defence, even though a statute would otherwise prohibit such person the enjoyment of such a right by reason of some incapacity. Moreso, if a State law prohibits the defence of certain weapons to be used me by a certain class of individual, would its usage under an emergency be exempted as a weapon of opportunity. What seems to have occurred through this discussion is that there has been a conflation of general defences of Criminal law that are extremely fact dependent to a degree of general constitutional guarantee, which was previously not found.

B. Right to 'bear' arms as a First Amendment Civil Liberty:

Borrowing from Bourdieu's conception of a '*habitus*,' it is argued that 'bearing' arms is in a symbolic sense, and expression of social ideology and the way of "a unitary set of choices of persons, goods, practices." Mugambi Jouet argues that bearing arms is in fact a representation of a group's identity.[119] He highlights, that in America, those who defend the right to bear arms reflect a resistance "*to "big government" and its regulations. This understanding can lead to intransigent opposition to gun control as a matter of principle due to the belief that government is overreaching*."[120] Moreover, it may be said that, even though citizens resistant to the Government would "*never fire a gun at a government official, their behaviour may be intended to dissuade government overreaching,*[provide self-defence or a resistance against tyranny] *or may have symbolic value in affirming these citizens' identity*."[121] Thus, in this sense, it may be argued that bearing arms is an 'expression' protected under the First Amendment.

Brannon and Reynolds argue that now that the right was been promoted to a status comparable to first amendment rights, there ought to be a similar standard of review.[122] Free Speech rights have a heightened standard of review due to its potential to have a "chilling effect."[123] To this effect, Justice Alito in the context of a first Amendment, adopted a standard of "recklessness" to judge free speech limits.[124] This is to say conduct that is reckless imposing serious threats to the safety of public and the freedoms of the other citizens, would not receive protection under the first amendment. Similarly, *Joseph Blocher and Bardia Vaseghi* argue that,[125] those bearing firearms or other arms, who either act reckless or disregard a substantial or justifiable risk, as a result of their weapon related conduct, such that the conduct amounts to a gross deviation from the standard of conduct of a law-abiding person, would not enjoy the protection of Second Amendment.[126] Alternatively, *Joseph E. Sitzmann* argues that just like free-speech rights engage in a review of the 'value' of the speech to be protected in juxtaposition to its relation with the intended coverage of First Amendment. To this effect, it is argued that, even arms may be classified as 'high value,' 'low value or 'no value,' where the asserted right may be compared with its objective of self-defence. In this manner, weapons that are kept for by an individual

[119] Mugambi Jouet, *Guns, identity, and nationhood*, 5:138 PALGRAVE COMMUNICATIONS 5-6 (2019).
[120] *Id.*
[121] *Id.*
[122] Brannon P. Denning & Glenn H. Reynolds, *Five Takes on McDonald v. Chicago.*
[123] United States v. Kelner, 534 F.2d 1020 (2d Circ. 1976).
[124] Elonis v. United States, 135 S. Ct. 2001 (2015).
[125] Joseph Blocher and Bardia Vaseghi, *True Threats, Self-Defence, and the Second Amendment,* 48 (2) The Journal of Law, Medicine & Ethics 112-118 (2020).
[126] *See* Model Penal Code § 2.02(2)(c), 'recklessness.'

[symbolically or for self-preservation], should they not serve the central purpose of second amendment, i.e., citizens right towards self-defence, they will not be protected by neither by first nor the second Amendment.

Similarly, it has also been argued that, the right to bear arms may also amount to be an expression of faith.[127] Political groups such as the National Republican Party claim the right to 'bear' arms as a divine right.[128] Some Christian thought also refers to the right as postulated in the Bible.[129] It is also argued that "*If one is convinced that possessing guns under the Second Amendment is a God-given right, gun restrictions can be perceived as anti-God and anathema*."[130] In that sense, "*[Guns] offer a source of identity comparable to a sense of self previously rooted in religious identity*."[131] That being the case, it is possible to assert a free exercise claim on the lines of right to 'bear' arms as well. With this thought, the right to exercise any religion includes a public affirmation of faithful belief.[132] Famously, in *Employment Div. v. Smith*,[133] Justice Scalia held that the Court does not second guess if an act is religious or not, rather the court merely checks a State restriction thereupon with a heightened scrutiny, i.e. if the State may able to justify with a compelling interest, without which State's duty to ensure public good cannot be met. The case involved federal law banning possession of certain psychoactive plants generally, which conflicted with the religious custom of Native American Tribes to consume 'Peyote' as part of a ritual. To this end the majority also held that "*It is a permissible reading of the [free exercise clause] … to say that if prohibiting the exercise of religion is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended…*" Later by the passage of the Religious Freedom Restoration Act & Religious Land Use and Institutionalized Persons Act, restored the compelling interest standard for imposing burdens on religious freedom. To this effect it is argued that, communities who view bearing of arms in general as a religious stipulation, as is allowed for the Native Americans to secure their traditional sacred objects from State interference under American Indian Religious Freedom Act, will be protected under First Amendment's Free Exercise Clause just as in Second Amendment. However, considering the standard of arms restriction as laid in *Bruen,* it is argued that while showing a compelling state interest on the religious use of a weapon, the State will also show that the text, history, and tradition of American history involved imposing a similar restriction upon the religious possession of certain weapons. Thus, the right to bear arms may also open itself to a claim of right to religion under the First Amendment as well.

[127] Melzer S, *Gun crusaders: the NRA's culture war*, NEW YORK UNIVERSITY PRESS (New York, NY, 2009).
[128] Republican Party, Republican platform (2016). http://www.presidency.ucsb.edu/papers_pdf/117718.pdf
[129] Larry Pratt, *Extremist files*, SOUTHERN POVERTY LAW CENTRE (2019) https://www.splcenter.org/ fighting-hate/extremist-files/individual/larry-pratt
[130] Mugambi Jouet, *Guns, identity, and nationhood*.
[131] Jessica Dawson, *Shall not be infringed: how the NRA used religious language to transform the meaning of the Second Amendment* 5:58 PALGRAVE COMMUNICATIONS 1-13 (2019).
[132] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, at 172, U.N. Dox. A/36/51 (1981), art. 6.
[133] Employment Div. v. Smith, 494 U.S. 872, 877-78 (1990).

SECTION B

THE ABSENCE OF A CIVIL RIGHT TO 'CARRY ARMS' IN INDIA

Constitutional Debates on the Right to 'Bear' Arms

The usage of arms to a right to preserve one's dignity was seeing as quintessential by India's founding fathers and constitution makers alike.

Mahatma Gandhi, hailed as the father of India, one who actively advocated for non-violence, was in fact an advocate of giving back people their right to bear arms. An anecdote from his biography stated: "*Among the many misdeeds of the British rule in India, history will look back upon the Act depriving the whole nation of arms as the blackest. If we want the Arms Act to be repealed, if we want to learn the use of arms, here is a golden opportunity. If the middle classes render voluntary help to Government in the hour of its trial, distrust will disappear, and the ban on possessing arms will be withdrawn*."[134] Suggestively, this statement came at a time when Gandhi sought the support of Indian sepoys to join the war against Nazi Germany as a strategy to gain British trust to negotiate for India's own independence.

This was envisioned, even though not in the final draft of our constitution, but still in one of the quintessential debates in the Constituent Assembly. On 1st December 1948, Shri H.V. Kamath, tabled a motion to include the right to bear arms, under the ambit of Article 13 of the Indian Constitution.[135] In support of his argument, Shri Kamath made a highlight from the Karachi Declaration of Freedoms, "*Every citizen has the right to keep and bear arms in accordance with Regulations and reservations made in that behalf*."[136] This clearly showcases as to how there existed a direct constitutional background and evolutionary past of the right to bear arms within the early draft of the constitution. It was deemed so essential that it was guaranteed as a fundamental right by the Congress to such an extent wherein it was even referred to as a necessary precursor to freedom or Swaraj. It is highlighted that during the Constituent Assembly debates, on 1 December 1948, H.V. Kamath, during a discussion around the rights to freedom, proposed an amendment to include a right to bear arms in Draft Article 13 (currently Article 19 of Constitution of India). His submission brought three arguments: that during the freedom struggles, from 1857, to the Non-Cooperation Movement, the Indian Naval Mutiny etc., one of the key demands of freedom was to enable Indians to manufacture and own their own firearms. India has faced and will be facing in future anti-social, secessionist and terror elements who could find it easy to not only access arms, but also put in danger those citizens who did not. Lastly, manufacturing would enable a sense of security that the state trusts them equally as the citizens trusted them, at the same time it would increase economic progression through manufacture of safe arms. Kamath was supported by Maulana Hasrat Mohani, who also argued that if Indian Constitution did not allow access to arms, it would be doing the same misdeed as its colonial masters had deprived the citizens of their basic rights.[137] This argument by Shri Kamath holds strong ground, for, firearms can empower individuals

[134] MOHANDAS K. GANDHI "MAHATMA", AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH, PART V., CH. XXVII.
[135] *Indian Framers Refused a Constitutional Right to Bear Arms*, CONSTITUTION OF INDIA.NET (Accessed on 24.05.2024) https://www.constitutionofindia.net/blog/desk-brief-indian-framers-refused-a-constitutional-right-to-bear-arms/
[136] *Id,* Debate 7.64.72, https://www.constitutionofindia.net/debates/01-dec-1948/#7.64.72.
[137] *Id.*

from disadvantaged backgrounds and provide them with a means of self-defence against crime and violence. In a society where access to resources and opportunities is often unequal, the ability to protect oneself and one's property can be a crucial factor to claim such a right.

However, the Chairman of the drafting committee of the Constitution, Ambedkar defended the non-incorporation of the right to bear arms in the Constitution. He draws a difference that, under the British era the application of Arms Act, had little to do with preventing law & order, rather the sole consideration was to disarm the populace. In contrast, in an Independent Constitutional Republic, it is not be conceivable as to "*how it would be possible for the State to carry on its administration if every individual had the right to go into the market and purchase all sorts of instruments of attack without any let or hindrance from the State*."[138] Based on this argument, the assembly voted in favour of excluding a right to carry arms as a fundamental right.

The debates on the access to arms, seem to indicate that indeed during the early years of independence, the state was still trying to consolidate all princely states and other territories to join the union and open proliferation of arms in that period would have hindered this process leading to open rebellion and factions. However, as the country has lived 75 years in democracy, we see exactly what Kamath had predicted, illegal weapons continue to find a way into the system despite strict firearm control, leading to several Naxal terror movements and gang-wars bearing unlicensed weapons, at the same time citizens are left powerless in the hands of state police, who themselves being run short of budget are forced to protect using sticks and batons against harmful criminals. This compels us to deliberate whether the Kamath's proposition would have bettered the current state of affairs.

Judicial Treatment of the Right to bear arms

In *Rajat Yadav v. State of UP*,[139] The petitioner applied for a fire arms license by application procedure under the Arms Act and Arms Rules, to which the licensing authority declined to grant the arms. The petitioner contends that the denial of the arms license to the petitioner on the sole assessment that the petitioner does not face any imminent threat to his life, is arbitrary and illegal.[140] *Per Contra*, the Respondent argued that that the petitioner did not satisfy the criteria for grant of arms license as laid down in the Government Order dated 08.11.2018, & The Arms Act and Rules. It was argued that the judgments relied by the petitioner have been rendered by various Single Judges of this Court, which are contrary to the law laid down by a Division Bench of the same Court in *State of U.P. v. Mahipat Singh*.[141] The court however, rejected this argument and held that a strict interpretation of the provisions of the Arms act, only certain professionals can be trusted to bear arms such as a trader, an industrialist, a law enforcement officer, military men or an elected representation to the legislature. Moreover, because no crime has been reported by or against the claimant, his application lacked adequate threat perception to him to warrant an Arms License. The court furthermore upheld the order of central government that provided that only those "who face a grave threat or imminent

[138] *Id.*
[139] Rajat Yadav v, State Of U.P., W.P. Civil No. 21097 of 2021. (Allahabad High Court)
[140] *Id,* He relied on various judgments rendered by the same court in Arvind Kumar v. State of U.P., 2012 76 ACC 457, Ram Chandra Yadav v. State of U.P., 2010 (69) ACC 490; Brij Nandan Singh vs. State of U.P., 2011 (75) ACC 331; Bhoore Singh v. State of U.P., Writ C No. 17507 of 2019; Indal Singh v. State of U.P., Writ C No. 17833 of 2019; Kammod v. State of U.P., Writ C No. 39541 of 2019
[141] State of U.P. v. Mahipat Singh 2014 (2) ADJ 134.

danger to their lives or there was real possibility of threat to their lives" were entitled for consideration of their applications for grant of license. To that extent, the order gave an administrative direction that no license be issued to anyone not bearing an actual threat.

The court also referred to a 5-judge bench of the Court in *Kailash Nath v. State of U.P.*[142] where, the right to bear arms was contended as part of right to life and personal liberty while challenging the restrictions imposed by the Arms Act. The court therein held that obtaining a license under the Arms Act is simply a privilege. The yielding of this privilege does not affect an individual's right nor does it lead to civil repercussions. To this end, Citizen may challenge an order rejecting or revoking a license on the grounds of arbitrariness. The court clarified that it is the State's primary duty to ensure the safety of its subjects and the right of citizens is thus, only secondary. Such license provisions do not fall within the scope of Article 21 of the Constitution, which guarantees right to life and personal liberty. This is because, Article 21 pertains only to deprivation of life, interpreted as total loss, as established in the case of *Gopalan v. State of Madras, 1950*. Therefore, it does not apply to mere restrictions on the grant of licenses for firearm possession, which is fundamentally different from licenses for trade or occupation.[143]

It unsettling how the Court views that duty to protect his person and property must be only with the state, an opinion that is not even grounded on Part III (Fundamental Rights) of Constitution. To that effect decision completely remains silent on the means and rights to self-defence.

In *Ganesh Chandra Bhat*,[144] a decision of the same court held that since, "life" in Article 21 to encompasses a right to dignity and self-preservation, the right to carry non-prohibited firearms is protected under Article 21. Denying such a right would be unreasonable, as it leaves law abiding citizen defenceless against an armed criminal. Furthermore, "*In these days when law and order has broken down it is only an armed man who can lead a life of dignity and self-respect. No criminal or gangster can dare to assault or threaten such a person for fear of retaliation."* To this end, it further held that whenever the license authority does not approve an arms license application within 3 months, it would be deemed to have been approved. However, the decision of *Ganesh Chrandra Bhat* was subsequently overruled by a 5-judge Special bench in *Rana Pratap Singh v. State of Uttar Pradesh*. Herein court made three observations, (a) private citizens in India possess firearms five times more that the state; (b) most arms licenses are procured merely as a status symbol; (c) despite such strict regulation and the legal limit of three licensed weapons, a large number of people own licenses beyond this limit, which in itself is illegal.

From the above stated observation, one thing can be seen is that the license regime run by state has a clear administrative flaw to allow illegal licenses to have been granted. However, the burden of these illegal grant of licenses is being faced by genuine cases where citizens must be granted license. It is also shocking how experience and media reportage has made a ground for the court's consideration to deny the citizen their right to bear arms. Moreover, one may even contemplate why the police force is under equipped with weapons for lawful use in a state where the court observed rampant crime statistics, and the toll of such under-security is being borne by citizens. It is obvious that in a state where the police force themselves are under-

[142] Kailash Nath v. State of U.P, AIR 1985 All 291.
[143] It can be seen that the 5-judge bench precedent relies on a decision of Supreme Court's definition of Right to life given in *Gopalan v. State of Madras*, which in itself has been overruled).
[144] Ganesh Chandra Bhatt v. District Magistrate, AIR 1993 All 291.

equipped, citizens would have to find a way to defend themselves which is by legally procuring licensed weapons or resorting to black market. While the weight of precedent in *Kailash Nath* trumps the decision *Ganesh Bhat*, but shockingly no observation has any concern to the legitimate demand for a right to bear-arms.

The Court in *Rajat Yadav* notes that an absence of danger to life and liberty of an applicant for firearms license, can be a valid and lawful reason for refusal of the firearm license. Moreover, lack of genuine requirement or the mere desire to hold an arms license is distinguishable from a safety need to possess a firearm. Therefore, while the court has not denied that, the right to self-defence and security may become a consideration to grant license, but only strengthened the argument that there must be reasonable restriction to that effect. As such the court has also acknowledged that an arbitrary denial of license is also ultra vires the due process guarantees of the Constitution. Thus, despite having the opportunity to lay down a balanced ruling with respect the right to be granted firearm license, court has simply skipped the question and without application of mind, allowed the license authority to essentially pocket veto the application by endlessly delaying the license granting process. It is correct that the Arms Act does not provide a deadline by which a license application must be decided, however, it has ignored the grave effects it might have on the safety and security of a citizen in genuine need for a weapon. It is such arbitrary delays that increase the black market for unlicensed weapons.

Another problem with the prevailing decisions is that they rely on an earlier decision in *Kapildeo Singh v. State Of Bihar*,[145] to emphasise on the fact that even in United States where Right to Bear arms is limited to constitute the reserved military force, thereby citing US precedent in *Presser v. Illinois*, and hence, a general right to carry arms is not permitted. However, Courts must be conscious that the position of the US on Arms Rights have changed significantly, and current license system of 'shall issue' prohibits the State from refusing right to arms on the subjective discretion of the administration. Moreover, as noted earlier in *NYSRPA v. Bruen II,* general self-defence has been the approved standard of grant of licenses, so long as compliance to the eligibility set in the statute has been met. It is unheard in general administrative law that State executives while deciding grant of licenses may take notice of external requirements beyond the administrative criteria laid in the Statute and any delegated legislation accompanying.

Thus, it is warranted that Indian courts re-decide at least the issue administrative discretion while granting firearm license not only in light of the growing recognition of right to self-defence but also learning from the Second Amendment Jurisprudence, which the court seems to have been misciting.

SECTION C

SUMMARY

This chapter discussed how the Right to 'Bear' arms focus primarily on the subject of individual self-defence, that falls on the ability of an individual to defend themselves using weapon in case of a life-threatening confrontation. Under the US Constitution, an individually may simply assert a right to carry a weapon, but it becomes the Government's burden to rebut the right by asserting either that the proposed weapon is of such a kind that has been historically restricted

[145] Kapil Deo Singh v. State of Bihar, AIR 1987 PATNA 122.

by the Government. To this effect it is also argued that carrying traditional weapons or firearms, may often be a symbolic expression of the identity of a group or that the using and carrying that weapon is a tenet of a religion.

In contrast, in India, the constitutional makers expressly rejected the idea of a civil right to carry arms, and instead adopted a prohibitionary regime as it existed under the British, primarily in the interest of preserving law & order. Furthermore, even the Indian Judiciary rejects the idea that an Individual may assert a right to self-defence as fundamental right to life and liberty, for the reason that it misinterprets such a right as only available in an absolute destruction of the life but not so available as a precautionary right. The Indian approach to that extent is evidently flawed for the reason that the state's licensing has been manipulated by certain privileged groups to secure illegal licenses. However, this issue adversely affects genuine applicants who deserve to be granted licenses. Furthermore, judicial standards to deny citizens their right to bear arms are primarily influenced by a mis-engagement with foreign jurisprudence and media reports.

To this effect, it is argued in order for citizens to enjoy their right to personal liberty to the fullest their right to self-defence using arms must not be diluted subject to overbroad discretionary power of licensing officials. Indeed, it is possible that a general right to carry weapons may be limited, however, such must be an enumerated restriction where the state may be empowered to determine if a weapon itself is of such a ‘low-value’ that it creates a troubling environment for the public at large. In such a case, the Constitution should require the state to show it has a ‘compelling interest’ to limit the use of the concerned weapon.

CHAPTER IV

THEORISING A WELL-TEMPERED RIGHT TO ARMS

As it had been discussed above the, the right to keep and carry arms can be conceptualised as a customary right and a civil liberty in different circumstance and context. However, existing provisions on such a right has received stark criticism over its inadequate protection to other liberties and the concerns it raises for the state duty to maintain public order. To that effect, in US it has been observed that fatalities occurring from firearm violence is 25% more than other affluent countries,[146] needless to mention the rising tide of horrifying school shootouts complemented by the ease in bureaucracy in several states to procure firearms in shall-issue jurisdictions. Similarly, as of 2019, India ranked fifth in the countries with the highest total gun deaths. Despite the strict gun laws, 90% of deaths by firearms in India are caused by using an illegally held weapon. It has been established that states with higher gun ownership are more likely to experience higher gun fatalities as is the case in Uttar Pradesh where 2,155 deaths were caused by illegal firearms; with 12,77,914 active licenses in the state.[147] Notwithstanding the proliferating black-market weapons, in the *Rajat Yadav* case, the court observed that the number of arms licence holders in the State are far in excess with the arms available to the Police force. Thus, clearly existing framework on the right to arms presents a compelling argument to heavily restrict the right.

However, it is argued that, building a legal culture that enables a secure access to weapons and a sensitive bureaucracy towards the needs of self-preservation, is likely to resolve these problems in the longer run. To this end, it is argued that theorising a well-tempered right to weapons fulfils these competing interests in the context of a arms regulation.

It has been argued above that a well-tempered power is one that ensures *balance, moderation & Self-awareness.* A well-balanced right harmonises coverage of a right with the costs to individuals. If establishment costs of a right are higher than interpretation costs, the right should be defined more as a standard instead of a rule. When theorised in the context of constitutional design of rights and guarantees, balance, refers to provision that reduces most social cost of negotiation, without disturbing the enforcement of any other rule. Moderation would mean that, the liberty of individual receives farthest coverage to extent being limited by a reasonable restriction established by a state. Self-awareness would mean rules are clearer and standards are most predictable to the understanding of Individual enjoying that right.

Grammar rubrics of a language, has a profound impact on the creation and operation of a Constitutional right, such that even a punctuation may have the authority to demarcate between protected freedoms and non-protected freedoms.[148] For instance, as declared in *Heller,* the use of a non-restrictive clause such as "*A well-regulated Militia, being necessary to the security of a free State*," not only delineates a positive aim of the state, it does not restrict the scope of the right to arms that follows this sentence. Thus, theorising a well-tempered right requires a careful use of grammar while framing a provision as a rule or a standard.

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[146] Giffords Law Centre, *Statistics*, https://giffords.org/lawcenter/gun-violence-statistics/ (accessed on Mar. 7, 2024).
[147] Suchitra Karthikeyan, *Guns and gun control laws in India*, THE HINDU (2022)
[148] Smith, Peter Jeremy, *Commas, Constitutional Grammar, and the Straight-Face Test: What If Conan the Grammarian Were a Strict Textualist?* Constitutional Commentary 845 (1999).

It is then argued that before framing a provision, the drafters must first compile all specific costs that are potentially spend on the establishment of a rule. In the context of the 2nd Amendment, it would not have been rational to expect for the drafters to provide a list of arms it did not want its citizens to possess within the Bill of Rights. Therefore, the rule that grants a general right to arms has been denoted as a standalone sentence bearing no distinction between militia class weapons and other arms. However, as discussed in *NYSPRA & Heller,* second amendment lacks adequate standard in its text to signify the limits to which such a right be claimed, and because of which the court steps in to provide a standard of 'dangerous or unusual' weapons that are excluded from the coverage of the act. It is argued that even by such proactive judicial treatment, the right, as is found in US, misses to imbibe moderation and self-awareness within its coverage, and such the provision cannot be said to be 'well-tempered.' *Firstly*, that the 2nd Amendment does not demarcate the grounds of public order or security of the state that may be conferred while imposing reasonable restrictions on the right. *Secondly,* the provision enables the Judiciary to supplant the wisdom of the drafters, and create standards that are not conclusive thereby, leaving room for errors by citizens to misunderstand the enforcement of the right. For instance, while all decisions post-*Heller* emphasized on the condition that restriction of right to arms must base on text, history, and tradition of American Constitutional law. But, such a determination vests in the Judiciary unhinged authority to make a political choice as to what forms of restrictions are historically entrenched and what are not. In such a system, citizens face doubts about the lawfulness of their arrangements regarding firearm possession and use. This also results in inconsistent arms regulations across jurisdictions, creating misperception for interstate travellers who move between areas with different legal standards. Regulation requiring the usage of smart weapon technology, which employs biometric or other unconventional authentication approaches to avert unlawful use, are also muffled due to lack of historical precedents for such technology. Thus, while the US Constitution grants an enumerated fundamental right to arms, it creates excessive social costs at the stage of the enforcement and implementation for the citizens due to a judge-made standard that seems to have completely usurped the value of the liberty that the rule guarantees.

Distinctively, the very lack of an enumerated or an unenumerated right to arms in India, broods an arbitrary regime of arms control, where citizens even lack the guarantee to assert a right to self-preservation using arms based on their own assessment of threat against them. The Arms Acts and the allied notifications grant an absolute power to the licensing authority to deny any arms license on his discretion and his perception of the threat that a licensee faces. While the courts have acknowledged that an arbitrary denial of license may be challenged on the grounds of arbitrariness, the standard evolved by the court is improper as it imposes an unimaginable burden on the claimant to show that the executive decision was 'irrational,' which is nothing short of displaying temporary insanity.[149] Moreover, despite such hard standards, large population of arms owner, have been granted more than three licences while Section 2(3) of the Arms Act limits the number to three. Moreover, the arms act predetermines that the privilege granted to elected officers and wealthy merchants to bear arms receives greater protection than an ordinary individual. Thus, even the Indian legal system fails to check arbitrary exercises of power over individuals who have a genuine need to keep and carry arms. Lastly, even though Indian criminal law excuses an act of private defence, this private defence

[149] P. Craig, *The Nature of Unreasonableness review,* 66 Current Legal Problems 131-167 (2013).

does not cover such a defence using non-lethal arms, and to this extent, all modern non-lethal weapons such as stun guns or tasers are also banned from civilian use in India.

Clearly, in light of the complexities surrounding the right to arms in the US and India, it is argued a well-tempered approach is vital to harmonize individual liberties with public safety and order. Borrowing from our previous discussion of a rule-standard formulation, a well-tempered right may be formulated as:

"*In respect of customs and usage of communities and the right to self-preservation of citizen, the right to keep and bear arms shall not be abridged subject to a law established in the interest of Public Order, Morality and Health*."

The said postulate conveys a several instructions that purport the right to keep arms remain well-tempered. First set of instructions is for the subjects, the communities are being assertively being made aware that they may keep their traditional weaponry, but this also conveys the stipulation that collective bearing of arms would be only permitter in pursuance to a provable 'custom or usage.' In this manner the provision mitigates a way reduce any potential ex-post social costs, such as cost for courts to resolve dispute by enabling them to establish standards as to what communities must meet in a society to assert a collective right to arms. The next limb of the provision grants a right to private defence on an individual by possessing a weapon. The provision covers 'citizenry' in its singular terms (in similar reference to the discussion in *Heller),* furthermore it fulfils a vital state interest of asserting sovereignty, i.e. citizenship. The provision is well balanced as it considers the interests of primary subjects of a nation at the same time prevents the gateway for the right to be misused by illegal subjects posing a threat to state security. The second set of instructions is to the State, where the right to made is subservient to a law made pursuant to the primary tripartite interests of the nations, i.e. security, values, and longevity. Here the citizens are reassured that any restriction on their right can only be made through a parliamentary legislation and not by an arbitrary government decision. The provision is a right mix of a rule-standard equation. Not only it established mandatorily as a rule that there exists a protected degree of the liberty to possess arms. It also enumerates adequate standards where judicial checks keep the excessive interference by the state under control.

It is uncertain if either India or US may change their existing traditions to insert such a formulation of a well-tempered right in their constitutions. However, as nations have tried time and again, certain incremental designs changes gradually can create the environment of a perfectly well-tempered power structure. One such method is changing legislative designs. For instance, in the Indian case, the arms act only endows a shadow privilege and that also to certain well-off individuals, to change this, the arms act must stipulate, the existence of a right to keep and bear arms, it must not endow piecemeal concessions to certain divided communities to keep their arms, rather must provide a registration mechanism that gives communities apart from the Sikhs and the Kodavas to seek collective exemption from arms regulation for their community. To ensure this itself does not become a bureaucratic slog, the law must provide a cut-off date until when should the state not reject their request with reasons, their exemptions must be deemed to be granted albeit usage restrictions continue to apply. State must legislatively provide institutions that are committed to research on the development of instruments and tools that can ensure non-lethal confrontation in case of self-defence. An environment for a well-tempered right must also be contributed by its moderations by progression. The idea will be that, if the state enables citizens to access non-lethal arms for

their self-defence, that being regulated by a license, then the access to lethal arms through black market may be cut out.

In case of lethal arms, arms regulating legislations must also incorporate 'shall-issue' permits subject to the claimant meeting stricter ex-ante conditions that are objectively determinate of actual and potential threat assessment. For instance, an arms permit may be mandatorily granted to a woman having shown an actual threat by reference a complaint in that regard. Here, the licensing authority must not be at the liberty to halt the request purely to buy time under the garb of a full-fledged investigation into the threat. Instead, a conditional permit must be issued to subject to conditions on its usage and carry. Apart from administrative standards of threat assessment, a well-tempered Arms rights law must also provide modern competency assessment standards such a mandatory psychological assessment before being granted a license to carry arms. Lastly, virtual limits on the access to number of weapons may be detailed as had been the case of 3 gun-limit in India. But as threat finds a way, the limits to right to self-preservation may also be exempted, and provide a provision that enables access to additional license beyond the general limit in case of exceptional threat. Thus, the force of a well-tempered right to arms legislation must mandatorily enable a general right to possess arms that are not lethal or claimants objectively demonstrate the need for the access to arms.

As to ensure moderation of this freedom, different jurisdictions in United States have developed different standards such as the 'sensitive places doctrine' which bans weapons in certain sensitive zones. Other restrictions classify certain dangerous class of weapons prohibited from carrying. The thrust of this paper is not to detail all the standards and rules that may be conceived to create a well-tempered right, rather the assertion that a well-tempered right has a higher potential to meet the social costs of individuals in the society than purely remaining an unenjoyable privilege. The argument is not simply to make the right to bear arms as an enumerated right, but also to recognise the value of the right differently for communities and individuals. It is also to acknowledge that reformulation of a right is not the sole way to resolve arms violence and school shoot-outs, but conceiving a right in a manner that is not riddled in legalese and not excessively bureaucratized enables the citizen to better assert their right in a careful manner.

In sum, it was discussed how in case of United States, the right to bear arms is now an established constitutional right, and how its regulation is in the hands of the several states. But the right nonetheless is not well-tempered as there is no certain standard of judicial review to adjudicate restrictions on that right. The scrutiny of a restraint on the right is tested for its existence in the text-history-tradition in the American Constitutional Law, but this excludes restraints required to regulate emerging modern weapon technology. Thus, there is a need to shift the judicial review standards of arms laws to test analogous to what is provided under the 1st Amendment. In that sense, the United States may contribute towards a well-tempered statute by providing a model right to bear arms code that espouses the limits to the access to arms, safeguards the assertion of the right as a custom and provide clear standards as to what may be constituted as a dangerous, or lethal weapons outside the access of citizens. In case of India, it was observed that the lack of a right and the excessive red-tapping of the licensing process for arms has plagued the system with unregulated weapons. This can be resolved by reinstating the existing arms act from a regulatory law to a facilitating law, that statutorily recognises a right to self-preservation using arms. Moreover, in order to further contribute to a well-tempered power, the legislation may espouse a proportionality assessment, similar to that of Aharon

Barak's standard of proportionality,[150] to check if the restriction on the right to arms is valid. The test *stricto sensu* has been illustriously divided on a 'Four-Pronged scale,' which must be proved conjunctively.[151] It must satisfy the following conditions: *"(i) lawful and legitimate goal; (ii) rational nexus with the objective sought; (iii) necessity and a least restrictive measure which must be equally effective; (iv) test of balancing conflicting rights.*" It is also argued that court must also provide clarificatory guidance for refining the second prong of the test: (1) While analysing whether there is a legitimate aim for restriction on individual right to manifest, the individual claim must not be diluted to mere private interest, rather it must be strictly viewed as a constitutional right, which could only be trumped if countered with an alternate constitutional limitation;[152] (2) while at the stage of balancing interests, the weighing in should only be between abstract weight of two or more constitutional rights. What this means is that, when we identify two conflicting constitutional claims at the initial stage, we must see in abstraction which right of the two is generally wider and subject to lesser restriction. Thereafter, we apply what we call the "*Law of Trumping: The higher the abstract weight of a right, the more likely it will trump competing considerations*."[153] In this way, by restricting the balancing test to only competing constitutional values, the scrutiny of restriction would increase.

In this manner, it is concluded that a liberty to keep and bear arms may be conceived as a well-tempered power and a right.

[150] AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (2012).
[151] K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.
[152] M Klatt and M Meister, *Proportionality—a benefit to human rights? Remarks on the I·CON controversy*, 10 (3) I•CON 687–708 (2012).
[153] *Id* 690.

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