To Define is Not Necessarily to Limit: A Focus on Importance of Definitions and Interpretation Clauses in Constitutional Interpretation

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Introduction

Generally, constitutions lay down broad principles and use words of wide import leaving it to the courts to interpret them suitable to the circumstances. Legislations have the tradition of using words of precise character and also defining the important words and phrases to remove ambiguity and suggest their meanings. According to Bennion definition serves several purposes: clarifying the meaning of a common word or phrase; denoting a complex concept by labelling; attracting a specific and existing meaning by referring to another law; excluding a meaning which otherwise would have been attributed; enlarging a meaning by including technique; and giving a full statement of the meaning comprehensively.[1] Definitions can also be classified in accordance with the purposes. In the Constitutions of the United States of America, Switzerland, France and Bhutan there are no definition clauses or interpretation clauses. The British-given constitutions have used the legislative technique of having definition clauses. Constitutions of Canada and Australia have one or two definition clauses about Canada and Australian Commonwealth. Canadian Constitution Act of 1982 has an interpretation clause (section 27 of the Canadian Constitution 1982) mandating that "This

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[1] F A R Bennion, Bennion's Statutory Interpretation (Fifth Edition, Lexis Nexis, 1984) 561

Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." Section 39 of the Constitution of Republic of South Africa states that while interpreting the constitutional Bill of Rights the Court, tribunal or fora must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, must consider international law and may consider foreign law. The German Constitution also uses definition clauses in two places, to explain who is a German and what constitutes majority of members of the Federal Convention which consists of Bunderstag and Lander. Section 311 of the Government of India Act 1935 gave definitions of various words with a typical language suitable for flexibility: "In this Act and, unless the context otherwise requires, in any other Act the following expressions have the meanings hereby respectively assigned to them." The Constitutions of India, Sri Lanka, Pakistan and Bangladesh contain numerous definition clauses. Article 152 (1) of the Constitution of the Peoples' Republic of Bangladesh 1972 provides definitions to 42 words.[2] Article 260 of the Constitution of the Islamic Republic of Pakistan 1973 defines 40 words.[3]

[2] The Article starts with a preface, "In this Constitution, except where the subject or context otherwise requires-" According to Mahmudul Islam, "Those terms must be understood as defined in that Article and the court is not at liberty to give any other meaning to those terms." However, departure is permissible if the context necessitates. Mahmudul Islam, Constitutional Law of Bangladesh (Third Ed. Mullick Brother, 2012) 54.

[3] The Article starts with a preface, "In this Constitution, unless the context otherwise requires, the following expressions have the meaning hereby respectively assigned to them"

Article 170 of the Constitution of Democratic Socialist Republic of Sri Lanka 1978 defines 12 words.[4]

Definitions hint prominence of law maker's intention of attributing a specific meaning in understanding the ambit of a word or phrase. This reminds the etymological meaning of the word "define." It is a word derived from Latin word *definitio*, which means "fixing a boundary or provide precise description".[5] The root word *finis s*uggests fence.[6] Hence it connotes putting limits on the ambit of a word. But in interpreting a constitution, which is a living and ever-growing document, whether the potency of words to yield meaning can be tied down to a meaning originally intended is a question to be answered from a larger perspective than mere original intention. The words "as it applies for the interpretation of Acts of the Legislature" is an example of analogous reasoning about which one shall be doubly cautious. The interface between GCA and Article 372 and its relation with the Constitution as a whole is an important factor to be influenced by constitutionalism.

In spite of the strong textual orientation of definition and interpretation clauses, constitutional jurisprudence has made strides in the matter of concepts of State, law, Money Bill and various words defined in the Constitution. GCA could not confine the tremendous growth of constitutional jurisprudence. On the basis of brief survey of the constitutional development around these definition and interpretation clauses, it will be argued in this

[4] Zaka Ali, The Constitution of the Islamic Republic of Pakistan (The ideal Publishers, Karachi, 2015) pp 246-252; also see Hamid Khan, Constitutional and Political History of Pakistan (Second edition, Oxford University Press, Karachi, 2009, 2016)

[5] https://www.merriam-webster.com/dictionary/definition

[6] P. Ishwara Bhat, Idea and Methods of Legal Research (Oxford University Press, New Delhi, 2019) 107-108.

paper that "to define is not necessarily to limit." It will be pointed out that their role consists in broadly suggesting the meaning and showing signposts but not in erecting the enclosing walls. Percolation of constitutional values through the thin cover of definitions is a pleasant reality.

Mapping the definition clauses

Clauses (1) to (30) of Article 366 of the Constitution of India give definitions of various words and phrases spread over diverse parts of the Constitution. Further, Part-specific and chapter-specific definitions are also traceable. There are definitions of specific words such as 'State' for the purpose of part III and part IV (Articles 12 and 35); 'law' and 'laws in force' for the purpose of part III (Article 13 [3]), definition of Money Bill under Articles 110 and 199 for the purpose of respective chapters; meaning of 'State' under Article 152 for the purpose of Part VI which excludes the State of Jammu and Kashmir from the purview of State; clauses (a) and (b) of Article 236 relating to interpretation of the words "district judge" and "judicial service"; clauses (a) to (g) of Article 243 relating to Panchayats, gram sabha etc,; clauses (a) to (g)of Article 243-P relating to municipalities, clauses (a) to (h) of Article 243-ZH pertaining to cooperative societies, paragraph 1 of Fifth Schedule about meaning of 'State' for the purpose of Fifth Schedule, clauses (a) to (d) of paragraph 1 of the tenth Schedule, paragraph 2 explaining about occurrence of disqualification on account of defection. These definitions have great utility because the words defined are technical, contextual, indigenous or enumerating various categories of persons, and enormous difficulty would have haunted the interpreters but for these definitions. The words "Scheduled Castes" or "Scheduled Tribes" is technical phrase referring to the notification issued by the President under Article 341 or 342. The word "State" has different contextual meanings in different parts. Article 12 uses the word

"State" to denote the person of incidence or entity against whom fundamental right can be claimed. Article 366 (26-B) defines State to include Union Territories for the purpose of Article 246-A (GST distribution), 268 (financial relations), 269-A (levy of GST) and 279-A (GST Council). Article 152 excludes State of Jammu and Kashmir from the ambit of State in view of special status to that State. Fifth Schedule excludes States of Assam, Meghalaya, Tripura and Mizoram from the orbit of Fifth Schedule as they are covered under the Sixth Schedule. Section 3 (58) of the General Clauses Act 1897 has defined the word State by referring to the first Schedule of the Constitution. These changing perspectives of "State" can be clarified by referring to different contextual definitions. Further, some of the words defined reflect indigenous concepts like "Panchayat", "Gram Sabha", "Indian State", "Anglo-Indian" etc. Moreover, it is comfortable to group persons belonging to various castes or tribes having characteristics of depressed classes under respective categories like Scheduled Castes or Scheduled Tribes through the mechanism of definition. Hence, definitions become inevitable and satisfy draftsman's necessity of economising the word length and avoiding repetition.

In addition to the above definitions, Article 367 makes the General Clauses Act 1897 (GCA) applicable for the interpretation of the Constitution. Although it uses the words "Unless the context otherwise requires" and subjects it to the operation of Article 372, it has the implication of putting the GCA, which is an ordinary law, on a higher pedestal to influence constitutional interpretation. The GCA defines numerous words, which are applicable in constitutional interpretation. The averment in Article 367 that GCA shall "apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of Dominion of India" is

suggestive of textual interpretation and the role of definitions in restricting the meanings of the words employed.

Theoretical aspects

Theoretically, the central argument of this paper has a basis in the spirit of the common law, philosophy of the Constitution and purposive character of the legal system. Although the legislature might be taking special precautions to give precise meaning when it defines specific terms, since the medium of expression is through language, the diseases of language such as ambiguity may creep in. Sir George Rankin says that definition must itself be interpreted before its application in case of ambiguity and the general purpose of the enactment shall be taken into account in a sense appropriate to the phrase.[7] According to the English precedents, the potency of the term defined shall be taken into account by looking at the purpose and effect of the legal provision and how it is coloured by the overall idea of common law.[8] According to Lord Hoffmann

> a definition may give the words a meaning different from their ordinary meaning. But that does not mean that the choice of words adopted by Parliament must be wholly ignored. If the terms of the definition are ambiguous, the choice of the term to be defined may throw some light on what they mean.[9]

Bennion states, "Whatever meaning may be expressly attached to a term, it is important to realise that its dictionary meaning is likely to exercise some

[7] ILM Cadija Umma v. S Don Munis Appu AIR 1939 PC 63 at 65.

[8] Oxfordshire County Council v. Oxford City Council and another [2006] UKHL 25 Lord Scott J; Green v. Governing Body of Victoria Road Primary School [2004] 2 All E R 763

[9] MacDonald (Inspector of Taxes) v. Dextra Accessories Ltd 2005 UKHL 47

influence over the way the definition will be understood by the court."[10] RGF Robinson says, "It is impossible to cancel the ingrained emotion of a word merely by an announcement."[11] K S Hegde J has observed in *N S Getty Chettiar* case,

> "An interpretation clause is not meant to prevent the word receiving its ordinary, popular and natural sense whenever that would be properly applicable, but to enable the word as used in the Act, when there is nothing in the context or the subject matter to the contrary to be applied to some things to which it would not ordinarily be applicable."[12]

S K Das J states that in case of ambiguity of definition clause, true view taken of the definition clause by other provisions of the Act and even by the aim and provisions of the subsequent Act or amendments must be seen.[13] There are examples where broad definition of cinematograph film is interpreted to avoid inclusion of video game within its ambit;[14] wide statutory definition of 'gaming' was cut down in the light of common law meaning of the word;[15] narrow definition of theft was not expanded to include pocketing of sale proceeds by a bar manager.[16] Bentham advocated for morally neutral

[10] Bennion, 562

[11] RGF Robinson, Definitions (Clarendon Press, Oxford 1950) 77; also see Bennion

[12] Commissioner of Gift Tax, Madras v. N. S. Getty Chettiar AIR 1971 SC 2410 para 14

[13] L Robert D'Souza v. Executive Engineer, Southern Railway, AIR 1962 SC 854 at 857

[14] British Amusements Catering Traders Association v. Westminster City Council [1988] 2 WLR 485; the element of 'immediately bringing to mind a film show' was not there in video game.

[15] McCollom v. Wrightson [1968] AC 522

[16] AG's reference No 1 of 1985 [1986] QB 491: ordinary people would not consider it as stealing.

definitions in contrast to persuasive definitions.[17] Instances of giving emphasis on some strand of definition because of its wider potency and overlooking the narrower one can also be found. In understanding the word ‘industrial building or structure’ the aspect of subjecting the materials into a process was given greater stress than manufacturing with a consequence that the word could cover more buildings.[18]

Concerning the constitutional philosophy that ought to influence constitutional interpretation, K Ramaswamy J in *Samatha*, while expounding the meaning of words “person” and “regulate” in the Fifth Schedule of the constitution stated,

> “It is an established rule of interpretation that to establish Socialist Secular Democratic Republic, the basic structure under the rule of law, pragmatic broad and wide interpretation of the Constitution make social and economic democracy with liberty, equality of opportunity, equality of status and fraternity a reality to "we, the people of India," who would include the Scheduled Tribes. All State actions should be to reach the above goal with this march under rule of law. The interpretation of the words 'person' 'regulation' and 'distribution' require to be broached broadly to elongate socio-economic justice to the tribals.”[19]

The idea of transformative constitution has motivated the judiciary to interpret the constitutional provisions to fulfil the constitutional objectives of establishing a welfare state with democratic features. Since definitions of key

[17] HLA Hart, ‘Bentham and Demystification of Law’ 36 Modern Law Review (1973) 8.

[18] Girobank plc v. Clarke (Inspector of Taxes) [1998] 4 All E R 312

[19] Samatha v. State of Andhra Pradesh AIR 1997 SC 3897 para 108.

words in the Constitution such as “State” and “Law” under Articles 12 and 13 have great bearing on the content, extent and value of fundamental rights interpretation of definitions should receive thrust, colour and spirit from the constitutional values.

Another theoretical justification for the central proposition of this article is that for purposive interpretation of the Constitution, which is a vital approach of dynamism, interpretation of definitions shall provide great succour and support. If definitions are authentic pillars of meaning stipulated by the Constitution Makers and hence reflect what Aharon Barak calls subjective purpose, its application along with objective purposes such as goals and functions designed for actualising in democracy shall aim to realise the ultimate purposes such as fundamental value goal of dignity, equality, liberty and justice.[20] When the whole legal system partakes the character of purposive enterprise definitions become tools to realise the purpose.

Historical background

The Constitution of India Bill 1895 gives definitions of “Parliament of India”, “District”, “law” and “citizens” in a separate section starting with the words “unless it is not repugnant in the subject or context.” Section 8 of the Commonwealth Bill of India 1925 defines the terms “The Commonwealth”, “Provinces” and “Parliament”. Section 311 (1) and (2) of the Government of India Act 1935 starts with the words, “In this Act and, unless the context otherwise requires, in any other Act the following expressions have the meanings hereby respectively assigned to them, that is to say…” and gives definitions of 29 terms used in the Act. Thus, both in the indigenous

[20] Aharon Barak, Purposive Interpretation in Law (Princeton University Press, Universal Publishers, 2007) 370-386

constitutional bills and the British-given constitutions the practice of using definition clauses to stipulate specific meanings to common words and phrases formed a tradition in the drafting of the Constitution.

The members of the Constituent Assembly had awareness that the definitions that they were making had got legal significance, as can be inferred from the speech of Sri K Santhanam made in the context of discussion on foreign State.[21] Dr Ambedkar explained the advantage of definition clause in enumerating various categories of Scheduled Castes and Scheduled Tribes identified by the executive.[22] CAD on definition of 'existing law' and 'law in force' shows concurrence of these two concepts.[23] CAD on foreign State attracted a discussion on international relations within the Commonwealth. The President of CA clarified that Article 366 (20) defines railway in order to exclude tramway from railway.[24] In draft Article 303 (2), corresponding to Article 367, there was no clause stating "as it applies for the interpretation of an Act of the Legislature of Dominion of India." This was added by adoption of an amendment suggested by Dr Ambedkar. One of the members, Shri Jaspat Roy Kapoor wondered whether it was necessary to include such clause as the Dominion status will not be continued after the commencement of the constitution. But the view was rejected pointing out that it is used to denote that only regarding the Acts and not Ordinance or Regulation that the GCA is made applicable.[25] It appears, some members had hesitation in treating the Constitution on par with ordinary statutes for the purpose of interpretation.

[21] CAD 16th September 1949 Book No 4 p. 1588

[22] *Ibid 1585*

[23] Dr Ambedkar CAD 16 September 1949 Book 4 p 1587

[24] CAD 17th September 1949 Book 4 p 1637

[25] *Ibid 1643-44*

Types of definitions

All the six types of definitions mentioned by Bennion can be identified in the text of the Indian Constitution. Some of the definitions may have features of one or more types mentioned by Bennion. Pigeonholing a definition exclusively to one type may not be possible. The purpose of this section is only to illustrate and not to make an exhaustive categorisation. The idea is to choose some sample definitions from each type and examine how constitutional interpretation has or has not adhered to strict textualism but received colour and content from constitutional values.

(1) Clarificatory definition: An example of clarificatory definition can be found in Article 366 (29A) on "tax on the sale and purchase of goods" which was incorporated by the Forty-sixth Amendment to remove confusion in Supreme Court judgments about validity of State sales tax laws on mixed types of transactions in goods for construction, hire purchase or catering.

> "tax on the sale or purchase of goods" includes— (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration; (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract; (c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments; a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration; (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration; (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or

> any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;

The words “corporation tax” [Article 366(6)] and “pension” [Article 366(17)] also come under the category of clarificatory definition.

(2) Labelling definition: Labelling definition can be found in Article 12 where it reflects the person of incidence of fundamental right or the entity against whom fundamental right can be claimed or holder of “burden of right”. “In this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.”[26] There are various expressions such as “High Court”, “Scheduled Castes”, “Scheduled Tribes”, “Indian State”, “Federal Court” etc., which are labelling specific entities or groups or institutions.

(3) Referential definition: For referential definition, Article 366 (1) is a good example. “Agricultural income” means agricultural income as defined for the purposes of the enactments relating to Indian income tax. Article 36 which refers to the definition of State under Article 12 is also a referential definition.

(4) Exclusionary definition: This definition deprives the term of a meaning it would or might otherwise be taken to have. As per Article 366 (20) “railway”

[26] Article 12

does not include— (a) a tramway wholly within a municipal area, or (b) any other line of communication wholly situate in one State and declared by Parliament by law not to be a railway. Section 311 of GIA 1935 had defined it inclusive manner. CA members paid their attention to this clause.

(5) Enlarging definition: Enlarging or inclusive definitions can be found in relation to words "State" under Article 12, "borrow" under Article 366 (4), "debt" under Article 366 (8), "goods" under Article 366 (12), "taxation" under Article 366 (28), "tax on income" under Article 366 (29) and "law in force" under Article 13 (3) (b) and 372 (3) Explanation I. The draftsman of enlarging definition should be careful to include all the necessary components as far as possible in order to avoid confusion.

(6) Comprehensive definition provides a full statement of everything that is to be taken as included in the term. It is also called as exhaustive definition. It ordinarily uses the verb 'means.' Comprehensive definitions can be found about the words "corporation tax"[27], "Scheduled Castes", "Scheduled Tribes", "Union Territory" etc. under Article 366.

G P Singh discusses about restrictive and extensive definitions.[28] The former uses the verb 'means' and gives exhaustive meaning whereas the latter uses

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[27] "corporation tax" means any tax on income, so far as that tax is payable by companies and is a tax in the case of which the following conditions are fulfilled:— (a) that it is not chargeable in respect of agricultural income; (b) that no deduction in respect of the tax paid by companies is, by any enactments which may apply to the tax, authorised to be made from dividends payable by the companies to individuals; (c) that no provision exists for taking the tax so paid into account in computing for the purposes of Indian income-tax the total income of individuals receiving such dividends, or in computing the Indian income-tax payable by, or refundable to, such individuals;

[28] G P Singh, Principles of Statutory Interpretation (15th ed. Revised by Justice Alok Aradhe, Lexis Nexis, New Delhi, 2021) 140-145

the verb ‘includes’. P B Gajendragadkar had said about inclusive or extensive definitions: “Where we are dealing with an inclusive definition, it would be inappropriate to put a restrictive interpretation upon the term of wider denotation.”[29] Some definitions use the both the verbs ‘means’ and ‘includes.’ For example, “pension” means a pension, whether contributory or not, of any kind whatsoever payable to or in respect of any person, and includes retired pay so payable, a gratuity so payable and any sum or sums so payable by way of the return, with or without interest thereon or any other addition thereto, of subscriptions to a provident fund (Article 366 [17]). Inclusion of specific components is done as an abundant caution. G P Singh extensively discusses about ambiguous definitions pointing out judicial approach of relying on broader legal values and purposes.[30]

Interpretation of definitions

The Threshold questions

Article 366 states that in the Constitution unless the context otherwise requires, the expressions defined in that article have the meanings respectively assigned to them in that article. Ordinary rule of interpreting a definition clause is that the meaning expressly assigned by the Legislature while coining the definition shall be given by the Courts in course of interpretation.[31] The expression, “unless the context otherwise requires” is a controlling expression of the Article preceding each of the words defined. Article 367 also uses the same controlling expression in the matter of

[29] State of Bombay v. Hospital Mazdoor Sabha AIR 1960 SC 610 at 614.

[30] Supra n.28 at P. 146-9

[31] D D Basu, Commentaries on Constitution of India volume 14 Lexis Nexis p. 11134

applicability of General Clauses Act 1869. In MT Khan case,[32] in interpreting the words "Advocate General" a question arose whether section 13 of the GCA would require that it should be understood in plural sense so that State may appoint more than one Advocate General. The Supreme Court viewed that it was a context requiring otherwise because Advocate General is a single entity who shall provide specific service like giving advice or permission to the state in his individual capacity. The Court observed, "It is a well-settled principle of law that the provisions of the constitution shall be construed having regard to the expressions used therein."[33]

Section 3 (58) of GCA defines State to include Union Territories with a preface "unless the context otherwise requires". In the matter of formation of boundaries of State under Article 3[34] and for the purpose of Entry 80 of the Union List I (extension of power of police)[35] Courts have used this definition to include Union Territories. In *T M Kanniyan* case a question arose whether in relation to distribution of legislative powers under Article 246 Union Territories are on par with States. Article 246 (4) enacts that "Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List". The Supreme Court stated, "It follows that in view of Article 246 (4), Parliament has plenary powers to make laws for Union Territories on all matters." Support was also gathered from Article 240 to the effect that the President has the power of making Regulations governing

[32] M T Khan v. Government of Andhra Pradesh AIR 2004 SC 2934

[33] *Ibid* para 13

[34] Ram Kishore Sen v. Union of India, 1966-1 SCR 430 at p. 438 (AIR l966 SC 644. at p. 648)

[35] Management of Advance Insurance Co Ltd. v. Gurudasmal, AIR 1970 SC 1126; (1970) 1 SCC 635.

Union Territories on subjects falling under the Union List. The Court concluded that it was repugnant to include Union Territories within the meaning of the word State. In a similar fashion, the term "State" defined under Article 12 has no application to the context of "Security of State" occurring in Article 19 (2). Thus, the threshold question of "context" gives scope for not applying the definitions.

Another factor of Article 366 is that the definition given thereunder is applicable to the whole of the Constitution.[36] Hence, the terms Scheduled Castes, Scheduled Tribes and Socially Educationally Backward Classes etc have same respective connotations wherever those words occur under the Constitution in whatever context. But there are some definitions (for example, Article 12, 13 and 372 Explanation-I) which are applicable to the concerned Part, chapter or Article.

Case law development

The words "agricultural income" defined under Article 366 (1) refers to meaning attributed to the words under enactments relating to Indian income tax. The use of plural 'enactments' suggests all the enactments of the Union Government relating to income tax. Once computed under the Income Tax, it cannot be recomputed under the Assam Agricultural Income tax Rules.[37] In *Williamson Financial Service* case the Supreme Court observed, "the definition of "agricultural income" in Article 366(1) indicates that it is open to the income tax enactments in force from time to time to define "agricultural income" in any particular manner and that would be the meaning not only for tax enactments but also for the Constitution. This mechanism has been

[36] Jaishri Laxmanrao Patil v. Chief Minister of Maharashtra AIROnline 2021 SC 240

[37] Assam Co Ltd v. State of Assam (2001) 4 SCC 202, 208-9 para 10

devised to avoid a conflict with the legislative power of States in respect of agricultural income."[38] The effect of this approach is that a constitutionally mentioned word has a meaning varying with a stipulation in an ordinary law. However, it is a rule of convenience and has similarity with other definitions as that of SC, ST, SEBC which vary with Presidential notifications or Parliamentary interventions from time to time.

The word *goods* includes all materials, commodities and articles (Article 366 [12]). It is broadly construed to include electricity,[39] all types of movable properties[40] and computer software. In *Tata Consultancy Services* case, the Supreme Court observed, "A software program may consist of various commands which enable the computer to perform a designated task. The copyright in that program may remain with the originator of the program. But the moment copies are made and marketed, it becomes goods, which are susceptible to sales tax. Even intellectual property, once it is put on to a media, whether it be in the form of books or canvas (in case of painting) or computer discs or cassettes, and marketed would become *goods*."[41] But electro-magnetic wave is not goods as it lacks the characteristics of transferability.[42] The word "goods" is used in the context of sales of goods. Transfer of property in goods is a crucial element here. The common law notion of

[38] Commissioner of Income Tax v. Willamson Financial Services (2008) 2 SCC 202

[39] CST v. MP Electricity Board, Jabalpur (1969) 1 SCC 200; State of AP v. National Thermal Power Corporation Ltd., (2002) 5 SCC 203

[40] Associated Cement Companies Ltd. v. Commissioner of Customs (2001) 4 SCC 593)

[41] Tata Consultancy Services v. State of A.P. (2005) 1 SCC 308

[42] Bharat Sanchar Nigam Ltd. v. Union of India AIR 2006 SC 1383

purpose and effect underlying the potency of words has influenced the judicial decisions pertaining to the subject.

The definition of “Tax on the sale and purchase of goods” [Article 366 (29-A)] was inserted by the Forty-sixth constitutional amendment in view of the Supreme Court judgments in *Gannon Dunkerley* and other cases[43] which denied legislative competence to state legislatures to enact sales tax law on transactions which were not confined to goods but had mixture of goods and other services provided in the form of works contract, hire purchase contracts etc. The Amendment included transactions in goods for deferred payment, execution of works contract, hire-purchase contract, supply of goods by unincorporated associations and catering contracts. The Supreme Court in *Builders' Association of India* discussed the relation of this clause with Article 286 and observed,

> “We are of the view that all transfers, deliveries and supplies of goods referred to in clauses (a) to (f) of clause (29-A) of Article 366 of the Constitution are subject to the restrictions and conditions mentioned in clause (1), clause (2) and sub-clause (a) of clause (3) of Article 286 of the Constitution and the transfers and deliveries that take place under sub-clauses (b), (c) and (d) of clause (29-A) of Article 366 of the Constitution are subject to an additional restriction mentioned in sub-clause (b) of Article 286(3) of the Constitution."[44]

The implication is that meaning assigned to the words defined draw colour from the structure of the Constitution. In Calcutta Club case the sales tax on

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[43] State of Madras v. Gannon Dunkerley and Co. AIR 1956 SC 560; New India Sugar Mills v. STC AIR 1963 SC 1207; Chhitter Mal v. STC AIR 1970 SC 2000; State of Tamil Nadu v. Cement Distributors AIR 1973 SC 668

[44] Builders' Association of India v. Union of India (1989) 2 SCC 645 : (AIR 1989 SC 1371)

transaction under catering contract was considered as not extendable to all types of goods supplied to club members.[45] Again, drawing colours from the distribution of powers can be found.

Article 366 (10) defines the expression "existing Law", which "means any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation." In brief, it is a law enacted by a competent legislature prior to the commencement of the Constitution. The requirement of legislative competence at the time of making of law (and not post-Constitution scenario[46]) is an important factor of its validity.[47] Its exclusive focus is on statutory law, including enactments, ordinances, orders, bye-laws, rules and regulations.[48] Its continuation after the commencement of the Constitution is subject to the operation of Part III and the constitution as a whole. The definition in Article 366 (10) resembles the definition given in section 311 (2) of GIA 1935. 'Law in force' defined in Article 13 (3)(b) and Explanation I of Article 372 has similar meaning with a difference that it is an inclusive definition: "The expression "Law in force" in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation

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[45] State of West Bengal and Ors. v. Calcutta Club Limited AIROnline 2019 SC 1194

[46] Kulkarni v. State of MP AIR 1957 MP 45

[47] Khandewal v. State of UP AIR 1955 All 12; Ramjidas v. State of Rajasthan AIR 1954 Raj 97 where the Essential Commodities Act 1947 was not applicable to Indian State in Rajasthan. Jeejeebhoy v. Asst. Collector of Customs AIR 1965 SC 1096

[48] Edward Mills v. State of Ajmer (1955) 1 SCR 735

either at all or in particular areas." H M Seervai[49] traces constitutional history of these two clauses and agrees with the analysis made by M C Chagla J in Heman Santlal Alreja[50] that both the expressions convey the same meaning. However, because of inclusive tone of "law in force" it includes customary law, Hindu and other personal laws.

In relation to definitions under Article 366, after a detailed discussion of case law in *Jaishri Laxmanrao Patil* case,[51] S. Ravindra Bhat J. observed that whenever the definition clause, i. e. Article 366 has arisen for interpretation, the Supreme Court has consistently given effect to the express terms, and in the broadest manner. Whenever new definitions were introduced, full effect was given, to the plain and grammatical terms, often, limiting existing legislative powers conferred upon the states. In this case, the scope of definition given under Article 366 (26-C) to the words "socially and educationally backward classes" to mean 'such backward classes as are so deemed under Article 342-A for purposes of this Constitution' was in issue. It was argued that in view of use of words "Central List" under Article 342-A (2) the expression and the list are applicable only for the purposes of the Union Government and not applicable to States. The majority of the five judges bench of the Supreme Court rejected this contention and held that the definition is applicable throughout the Constitution wherever the expression is used. However, by the 105th Constitutional Amendment, which was made in response to dissatisfaction against the Supreme Court judgment in *Jaishri*, clause (26-C) was amended to have a new version, "'such backward classes as are so deemed under Article 342-A for purposes of the Central Government

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[49] H M Seervai, Constitutional Law of India 4th ed. Vol I pp 407-408

[50] State of Bombay v. Heman Santlal Alreja AIR 1952 Bom 16

[51] Jaishri Laxmanrao Patil v. Chief Minister of Maharashtra AIROnline 2021 SC 240

or the State or union territory as the case may be." An Explanation was added to Article 342-A (2) to the effect that Central List meant List of SEBC prepared and maintained by or for the Central Government. Clause (3) was added to authorise States and Union territories to make law for preparing and maintaining a list of SEBC for its own purposes and the entries in such list might be different from the Centrallist. In construing the definition of Money Bill under Article 110 (1)[52] several questions arose in *K S Puttaswamy case (Aadhar)*.[53] Whether the word "only" therein implied that matters other than those mentioned in (a) to (g) cannot be included under the Money Bill? Whether the Speaker's labelling of a Bill as

[52] Article 110 Definition of Money Bill: **(1)** For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains **only** provisions dealing with all or any of the following matters, namely:--**(a)** the imposition, abolition, remission, alteration or regulation of any tax; **(b)** the regulation of the borrowing of money or the giving of any guarantee by the Government of India, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India; **(c)** the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such Fund; **(d)** the appropriation of moneys out of the Consolidated Fund of India; **(e)** the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure; **(f)** the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State; or **(g)** any matter incidental to any of the matters specified in sub-clauses (a) to (f). **(2)** A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licenses or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes. **(3)** If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final. Similar provision can be found in Article 199 in relation to States.

[53] K S Puttaswamy v. Union of India, AIROnline 2018 SC 237.

Money Bill is judicially reviewable? The majority judgment of the five judges bench rendered by A K Sikri J (on behalf of himself, Dipak Misra CJI and Khanwilkar J) held that section 7 of the Aadhar Act, which provided for targeted delivery of benefits, subsidies and services as a part of welfare scheme drawing support from Consolidated Fund of India, was in pith and substance falling under more than one clause of Article 110 (1) and that rest of the provisions of the Act were incidental to them, and hence the Aadhar Act was rightly passed as Money Bill. The learned judge found it unnecessary to adjudicate on the issue about finality of Speaker's decision about characterising it as Money Bill. The judgment referred to historical and comparative experience, examined the implication of bicameralism, convinced about the welfare purpose to arrive at the conclusion. The dissenting judgment by D Y Chandrachud J took a rigid view of the word 'only' to exclude all those provisions which do not have financial implication and used the word 'incidental' to denote closely proximate relations. Both the judgments gathered support from the constitutional values and structure, although with varying degrees of emphasis. D Y Chandrachud J categorically stated about judicial reviewability of Speaker's decision. Asok Bhushan J concurred with the majority, but held clearly that Speaker's decision is subject to judicial review. This is in contrast to earlier precedents[54] which did not probe into propriety of Speaker's decision about 'Money Bill' in view of

[54] Mohd. Saeed Siddiqui v. State of U.P., (2014) 11 SCC 415; Mangalore Ganesh Beedi Works v. State of Mysore and Anr., 1963 Supp (1) SCR 275; Ramdas Athawale v. Union of India and Ors., (2010) 4 SCC 1

finality of Speaker's decision under Article 110 (3).[55] Thus, potency of words in a definition gather colour from other provisions also.

Article 236(a) defines the expression "District Judge" as including judge of a city civil Court, additional district Judge, joint district Judge, assistant district Judge, chief Judge of a small cause Court, chief presidency magistrate, additional chief presidency magistrate, sessions Judge, additional sessions judge and assistant sessions Judge. This is an extensive definition and does not cover every category of a district Judge. The Supreme Court in *Labour Law Practitioners'Association* case observed, "The term "District Judge" should not be confined only to the Judge of the Principal Civil Court in the hierarchy of General civil Courts. The term would now have to include also the hierarchy of specialised civil Courts, such as a hierarchy of Labour Courts and Industrial Courts."[56] But Family Court Judges are not members of "Judicial service" in view of their specific exclusion from the cadre of State judicial service by Rules of 2008. In *SD Joshi* the Court distinguished the *Labour Law Practitioners'Association* case, and held that Family Court judges are not District Judges.[57]

There is huge growth of case law on the definition of "State" under Article 12. A brief survey of trajectory of cases will unfold the judicial approach of gathering support from constitutional values. The Madras High Court in

[55] The issue is pending for larger bench's decision which is awaited. Rojer Mathew v South Indian Bank Ltd. (2020) 6 SCC 1 : (AIR 2019 SC (Supp) 2419); Beghar Foundation through its Secretary and Anr. v. Justice K.S. Puttaswamy (Retd.) AIROnline 2021 SC 49

[56] State of Maharashtra v. Labour Law Practitioners' Association 1998 AIR SCW 1072

[57] S.D. Joshi and Ors v. High Court of Judicature at Bombay 2011 AIR SCW 1060

Shantabai case[58] interpreted the expression "other authorities" to exclude university from its ambit by applying *ejus dem generis* rule. Overruling this approach, in *Rajasthan Electricity Board* case[59] the Supreme Court laid down a new test, "Those authorities which are invested with sovereign power i.e. power to make rules or regulations and to administer or enforce them to the detriment of citizens and others, fall within the definition of "State" in Article 12." This had the effect of bringing public economic enterprises established by the governments under the definition and expand the applicability of right to equality. In *Sukhdev*[60] K K Mathew J observed that since public corporations sprang from the new social and economic functions of Government they shall be considered as instrumentalities of the State. In R D Shetty[61] the instrumentality test gained the support of the majority. In *Ajay Hasia* the Court recognised the imperative that public enterprises launched by governments shall be bound by obligation to respect fundamental rights, the Court observed,

> "We must therefore give such an interpretation to the expression "other authorities" as will not stultify the operation and reach of the fundamental rights by enabling the Government to its obligation in relation to the Fundamental Rights by setting up an authority to act as its instrumentality or agency for carrying out its functions. Where constitutional fundamentals vital to the maintenance to human rights

[58] University of Madras v. Shantha Bai AIR 1954 Mad 57; B. W. Devadas v. Selection Committee for Admission of Students to the Karnatak Engineering College, AIR 1964 Mys 6.

[59] Rajasthan State Electricity Board, Jaipurt v. Mohan Lal AIR 1967 SC 1857

[60] Sukhdev and Ors. etc. v. Bhagatram Sardar Singh Raghuvanshi (1975) 1 SCC 42l : (AIR 1975 SC 1331)

[61] R D Shetty v. International Airport Authority (1979) 3 SCC 489; AIR 1979 SC 1628

are at stake, functional realism and not facial cosmetics must be the diagnostic tool, for constitutional law must seek the substance and not the form."[62]

The approach of drawing colour and content from constitutional values is clear here. Summarising the instrumentality test formulated in *R D Shetty* case the Court laid down six points tests.[63] In Pradeep Kumar Biswas the seven judges bench of the Supreme Court held that if an organisation satisfies any one of the six tests laid down in *Ajay Hasia*, it will be considered as State.[64] The question is whether on facts the body is financially, functionally and administratively dominated by or under the control of the Government. In

[62] Ajay Hasia v. Khalid Mujib AIR 1981 SC 487; (1981) 1 SCC 722 para 7; it was also observed, "The constitutional philosophy of a democratic socialist republic requires the Government to undertake a multitude of socio-economic operations and the Government, having regard to the practical advantages of functioning through the legal device of a corporation embarks on myriad commercial and economic activities by resorting to the instrumentality or agency of a corporation, but this contrivance of carrying on such activities through a corporation cannot exonerate the Government from implicit obedience to the Fundamental Rights."

[63] Ibid Para 9 lists the circumstances of state action: (1) "if the entire share capital of the corporation is held by Government"; (2) "Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation"; (3) "whether the corporation enjoys monopoly status which is the State conferred or State protected."; (4) "Existence of "deep and pervasive State control"; (5) "If the functions of the corporation are of public importance and closely related to governmental functions; (6) "Specifically, if a department of Govt. is transferred to a corporation, ".

[64] Pradeep Kumar Biswas v. Indian Institute of Chemical Biology and Ors. (2002) 5 SCC 111

BCCI case[65] the Court reiterated what was observed in *Sukhdev*[66], "Activities which are too fundamental to the society are by definition too important not to be considered Government function. This demands the delineation of a theory which requires Government to provide all persons with all fundamentals of life and the determinations of aspects which are fundamental."[67] The contribution of wider meaning of "other authorities" towards expansion of availability of fundamental rights by bringing large number of bodies within its ambit was possible by receiving inputs from the constitutional values.[68] The journey from *Shantabai* to *BCCI* towards the direction of expansion and efficacy of rights vindicates both revitalisation of definition and concern for human rights and welfare. Whether judiciary is State under Article 12 is a question addressed in some cases. While the executive[69] and legislative[70] function of the Courts or quasi-judicial bodies have been considered as state action. But the judicial functions of quasi-

[65] Board of Control for Cricket in India v. Cricket Association of Bihar, 2015 AIR SCW 2258 overruling Zee Telefilms Ltd. and Anr. v. Union of India and Ors. (2005) 4 SCC 649 : (AIR 2005 SC 2677).

[66] Sukhdev and Ors. etc. v. Bhagatram Sardar Singh Raghuvanshi (1975) 1 SCC 42l : (AIR 1975 SC 1331)

[67] Ibid para 102; BCCI para 23

[68] B S Minhas v. Indian Statistical Institute (1983) 4 SCC 582; AIR 1984 SC 363; P K Ramachandra Iyer v. Union of India (1984) 2 SCC 141; All India Sainik School Employees' Association v. Sainik School Society AIR 1988 SC 88; Bihar State harijan Kalyan Parishad v. Union of India (1985) 2 SCC 644

[69] State of Bihar v. Balamukund Sah AIR 2000 SC 1296; (2000) 4 SCC 640; Bidi Supply Co v. Union of India (1963) SCR 778

[70] Prem Chand Garg v. Excise Commissioner AIR 1963 SC 996; in Amirabbas v. State of MB (1960) 3 SCR 138 at 142 Shah J observed, "denial of equality before the law or the equal protection of the laws can be claimed against executive or legislative process but not against the decision of a competent tribunal.

judicial bodies[71] and purely judicial function are not yet regarded as state action.[72] D D Basu extensively discusses this unsatisfactory position and argues that from the perspective of constitutionalism judiciary shall also be considered as State under Article 12. The lacunae in this sphere is to a certain extent made good by use of the concept of complete justice under Article 142 and curative remedy under Article 32.[73]

Another important set of definitions that has relevance to fundamental rights is pertaining to "law" and "law in force" under Article 13. While in early cases the term "law" was interpreted to include only ordinary law and not constitutional amendment,[74] in *I C Golaknath*[75] the Court by 6: 1 majority interpreted it to include constitutional amendment and held that Parliament had no power of amending provisions of part III as it shall not contravene any of the fundamental rights. This proposition, in fact, went against the basic idea that Constitution stands at a higher pedestal than ordinary law and that constituent power of making or amending the constitution is of superior level than that of ordinary law- making power. The Twenty-fourth Constitutional Amendment Act 1971 added Clause (4) and made necessary changes to Article 368 to set right the position. Although the amendment was upheld in

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[71] Parbhani Cooperative Society v. RTA AIR 1960 SC 801; Ujjambai v. State of Uttar Pradesh (1963) SCR 778

[72] Naresh Sridhar Mirajkar v. State of Maharashtra (1966) 3 SCR 744; AIR 1967 SC 1; but the minority view of Hidayatullah J was to the effect that in cases of purposeful discrimination and invasion of fundamental right remedy can be claimed against judiciary. In Budhan v. State of Bihar AIR 1955 SC 191 there was an approach of considering all three functions of judiciary as state action.

[73] Rupa Ashok Hurra v. Ashok Hurra AIR 2002 SC 1171

[74] Shankari Prasad Singhdeo v. Union of India AIR 1951 SC 458; Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845

[75] I C Golaknath v. State of Punjab AIR 1967 SC 1643

Kesavananda,[76] the basic structure theory put a serious limitation upon Parliament's power of amending the Constitution, especially fundamental rights most of whom have been held as part of the basic structure. Both the cases have built their arguments on constitutional values.

The question whether personal law is law for the purpose of Article 13 (1) came before the Bombay High Court in *Narasu Appa Mali* case.[77] MC Chagla CJ and P B Gajendragadkar J traced the legislative history of the word law. Section 112, Government of India Act, 1915, consistently with the past statutory position, had used both the expressions 'personal law' and 'customs having the force of law' thus pointing out that these were two different types of norms. While the former had genesis in scriptures and religious or moral norms, the latter came into existence because of social practice. Section 223 of the GIA 1935, Article 372 Explanation I and Article 13 (3) (b) evolved a common approach of not mentioning the expression 'personal law'. Both the learned judges declined to hold 'law' under Article 13 (3) (a) to govern the meaning of 'laws in force' under Article 13 (3) (b) as they were meant for different purposes viz., dealing with post-Constitution and pre-Constitution laws. In view of Article 44 they inferred that the Constitution Makers intended to bring material reforms in personal laws and even bring common code, but they did not wish that the provisions of the personal laws should be challenged by reason of the fundamental rights guaranteed in Part III of the Constitution and so they did not intend to include these personal laws within the definition of "laws in force". The impugned law was a piece of social reform introduced to the Hindu community of Bombay province to prohibit monogamy. Upholding of the law was in consonance with the spirit of reform and gender

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[76] Kesavananda v. State of Kerala AIR 1973 SC 1461

[77] State of Bombay v. Narasu Appa Mali AIR 1952 Bom 84

equality, although in the larger perspective abstinence from subjecting the personal law to the fundamental rights opportunity of scrutinising and determining its validity was lost by such an approach. There are judgments by other High Courts applying the Part III test to customary personal laws and statutory personal laws.[78] The Supreme Court has also determined the validity of section 9 of Hindu Marriage Act in the light of right to equality and right to life.[79] Exercise of habeas corpus jurisdiction in matters of custody of minor children is one sphere where constitutional principles percolate into personal laws.[80] In *Shayara Bano*[81] or triple talaq case there was a fractured judgment on the issue whether personal law is law. Three judges of the five bench Court (Kurien Joseph J, Rohinton F Nariman J and U U Lalith J) relied on *Shamim Ara* case[82] to hold that a valid talaq in accordance with Koran shall be for a reasonable cause and shall be preceded by an effort of reconciliation by two arbitrators belonging to two respective families of wife and husband. Nariman and Lalith JJ applied the doctrine of manifest arbitrariness while Kurien Joseph J used the idea of Koranic reasonableness. But Kurien Joseph J also sided with Jagadish Khehar CJI and Abdul Nazeer J for a proposition that personal law is based on religion and had an element of religious freedom. This position is problematic because it blocks the way of scrutinising and purging personal law with the touchstone of fundamental rights. It is a kind of revival or approval of *Narasu Appa Mali* case. Although anomalous

[78] Srinivasa Aiyar v. Saraswati Ammal AIR 1952 Mad 193

[79] Saroj Rani v. Sudarshan Kumar AIR 1984 SC 1562; (1984) 4 SCC 90; T Sareetha v. T Venkatasubbiah AIR 1983 AP 356; Harvinder Kaur v. Harmandil Singh AIR 1984 Del 66

[80] Tejaswini Gaud v. Shekhar Jagadish Prasad Tiwari 2019 AIROnline SC 256

[81] Shayara Bano v. Union of India AIR 2017 SC 4609

[82] Shahim Ara v. State of Uttar Pradesh AIR 2002 SC 3551

situation prevails on the question raised in *Narasu Appa Mali*, application of constitutional values of reasonableness in this sphere is evident.

Conclusion

Definitions reflect the Constitution Makers' express attribution of meaning appropriate to the words defined. The drafting technique of giving definitions enables brevity, avoids repetition, saves time and allays confusion. It is basically a textualist tool of interpretation. But it is not self-sufficient and does not guarantee freedom from ambiguity. Although it has tendency to limit the scope of word defined, in the context of a constitution, which is a living and dynamic document, judiciary cannot afford to constrain the meaning of words to the four corners of the definition. Employing a common law approach, courts gather the colour and content from other provisions and basic purpose of the Constitution. Avoiding the straightjackets and stereotypes, the Indian judiciary has, by and large, constructed the definitional jurisprudence in support of broader constitutional jurisprudence by relying on values. Truly, to define is not necessarily to limit but it is to provide a signpost for a visibility of meaning. While laudable development has taken place in the domain of State under Article 12, the position on personal law vis-à-vis Part III is problematic and needs to be set right at the earliest.