

Subject **Law**

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Paper : Access to Justice

Module : Access to Justice Concept: History and Evolution



ज्ञान-विज्ञान विमुक्तये



Component - I - Personal Details

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Component - I (B) Description of Module

	Description of Module
Subject Name	Law
Paper Name	Access to Justice
Module Name/Title	Access to Justice Concept: History and Evolution
Pre-requisites	Understanding the concept of Access to justice, Various statutory provisions regarding Legal Aid.
Objectives	To provide an understanding of access to justice and evaluate the factors that inhibit the effective access to justice
Keywords	Justice, Access to Justice, Impediments to access to justice, alternative dispute resolution methods



Component - II

Module I Access to Justice –History and Evolution

**Structure:**

1. Introduction
2. Learning objectives
3. Meaning of justice
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4. Concept of Access to Justice
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  - 4.2. Modern view on access to justice
5. Mechanisms for access to justice
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### 1. Introduction

Law and justice are two concepts which are inextricably linked to each other. To study law without comprehending justice is like possessing a pen without ink. One is of little use without the other. In a similar vein, a famous jurist has said -Law without justice is blind and justice without law is lame. Despite the fact that both the concepts go hand in hand, it is difficult to assign precise meanings to each. Different theories have been propounded to clarify the meaning of law. While some of the theories have sought to explain what law is which law from the point of view of its origin or source, other theories have gone on to explain law in terms of its nature, its role and purpose in society and also its evolution.

The same may be said to be true about justice also. We need to understand that the word 'justice' as a concept in law connotes different meanings to different people. Different countries and cultures look at justice in their own distinct way. There is therefore no universally acceptable definition of justice. What one society may regard as justice may not be so in another society which has a different social background, culture, level of education, religious belief. This only shows that the concept of justice is a nebulous one and that its definition is greatly influenced by politics, ideology, religion, ethics, culture and such other factors.

Yet although the word justice defies all attempts at precise definition, scholars have since times immemorial striven to create as near as possible a meaning of the term. Although none of them, may have been able to capture the essence of justice in a single definition, nevertheless, it is worthwhile to be acquainted with different perceptions jurists have had of justice, as they each demystify the magic and mystery surrounding it.

Before we take up the various meanings of justice, it would do us well to understand justice in the context of an injustice through an illustration.



Janki was at school, studying in the second standard. Her teacher announced that there would be a spellings test on a particular date. Janki scored full marks in her test but instead of being overjoyed and happy, returned home very disappointed and unhappy. Upon inquiring into the reason for her disappointment, Janki said that her teacher had not given her a 'golden star' for her test, but her friend who had also scored full marks in the same test, had been given one. Little Janki was dismayed by the action of her teacher. She exclaimed helplessly to her mother, "It's not fair."

All of us, like little Janki, must have personally experienced some kind of injustice at some point of time, in some situation or the other. The unjust situation must have surely brought disappointment, anger, frustration and a sense of despair. We may also have felt cheated for not having been treated in the same manner as the other/s. It is in the background of injustice done, that one is better able to appreciate and understand the meaning of Justice.

A significant human truth is that every human being desires justice in any and every situation. It is unimaginable to think of any human being who would not desire justice. People desire justice in every sphere of their life whether in day to day life or in the more significant aspects of their life. Justice is the desire of every individual whether he is young or old, rich or poor, male or female just as it was for young Janki, in our illustration. It is an aspiration of people the world over, cutting across boundaries of country, race or religion. It is no different with societies -whether in our ancient societies, or society during the Middle Ages or modern day society.

In all this it is extremely interesting to find Western philosophers attempting to define justice since the early times.

## 2. Learning Objectives:

After reading this module the reader would be able to

- Understand the meaning and significance of justice.
- Obtain a conceptual analysis of the framework on access to justice.
- Identify and recognize the various impediments within and outside the justice - system that hinder access to justice.
- Comprehend dispensation of justice as a fundamental function of a Welfare State.
- Provide critically assess how access to justice can provide the key to the reform of law and institutions.

## 3. Meaning of justice:

It has been aptly stated, "The idea of justice is so ancient that everything has been said about it and it is so modern that it constitutes an ever-changing context of contemporary society."<sup>1</sup> From this perspective, we may say that justice had a traditional meaning and has acquired a more technical and complex meaning in modern times.

### 3.1. Traditional view:

At the outset it may be mentioned that the various attempts at a definition tilted more towards the essential features of justice. Traditionally, justice was seen as a moral virtue of character as well as an important and desirable attribute that a political society would require to



possess.<sup>ii</sup> According to this view, justice is an important quality which lays emphasis on doing right or performing fair or just actions. In this sense, for Plato, justice is giving to each person his due. Justice in this sense involves the fair, equal, moral and impartial treatment of all. In a simple sense therefore, justice is ensuring that fair results are produced. To put it in different words, justice is done when a person duly receives what he is entitled to receive. When one receives what one deserves, it is an indication of the absence of discrimination. An absence of discrimination in turn demonstrates the application of standards which are fair and equal. Justice is thereby achieved when one simply gets what he ought to have received. The practice of justice as a virtue establishes social order, peace and harmony. Thus in giving to each person what rightfully belongs to him, justice ensures the fair and equitable distribution of resources. In this sense justice encompasses the concept of equality and signifies that in the distribution of benefits or burdens, equals should be treated equally and those who are unequal may be treated unequally in proportion to their inequality.

Thus in traditional times, justice was considered an important virtue which had to be cultivated in one's relations with another. Being a virtue it was an innate quality which had a divine origin in man which revealed itself by reason. With justice as a god-given quality, human beings would have to ensure that justice would direct all of their activity and work. What we find therefore is that in early times, justice was undifferentiated from morality and religion. Justice in this sense came to be referred to as natural justice. Although justice received much importance it was clear that it was considered more of a religious or moral obligation.

The traditional view of justice as being divine is also evident in its administration. The king as the head of the kingdom performed several functions. He would make the laws, govern his people and also dispense justice. The king was considered as the fountain-head of justice and justice was the privilege of the king. Anyone deserving justice approached the King's court pleaded before the king. In early times, the king was considered to be the representative of God on earth. The king therefore saw dispensation of justice as a divine mandate. The king after hearing the defendant would deliver his judgment. Justice thus was the bounden duty of the king akin to 'Dharma' in Indian philosophy.

In a like manner, the Magna Carta or the Great Charter in 1215 underscored that justice was an imperative obligation in the historic words which proclaimed, "To no one will we sell, to no one will we deny or delay, right or justice"<sup>iii</sup>.

It was only with the passage of time and the modern development of law and State, that justice was dissociated from religion and morality and came to be understood as legal justice. As the State substituted the King, the administration of justice became the function of the courts which were an important arm of the State. The courts came to dispense justice according to law which was enacted by the law-making body.

### 3.2. Modern view:

In the context of a legal system, natural justice is built into the legal rules and their observance becomes compulsory in the realization of justice. Justice dispensed in accordance with such legal rules is legal justice. Giving to a person what is due to him depends on the law. Law determines what a person is entitled and also lays down the circumstances in which he can stake his claim to such entitlement. A person so entitled or having a claim is said to be a right holder. Another, who has a corresponding duty to recognize and respect the right of its holder, is referred to as the duty bearer. Where the law confers rights, justice is achieved



when rights are enforced in accordance with the law. Where the right of another is not respected, it amounts to the violation of the right of the former. In case of a violation of his right, the right holder would be caused an injustice. Justice would be achieved only where the wrong caused was set right.

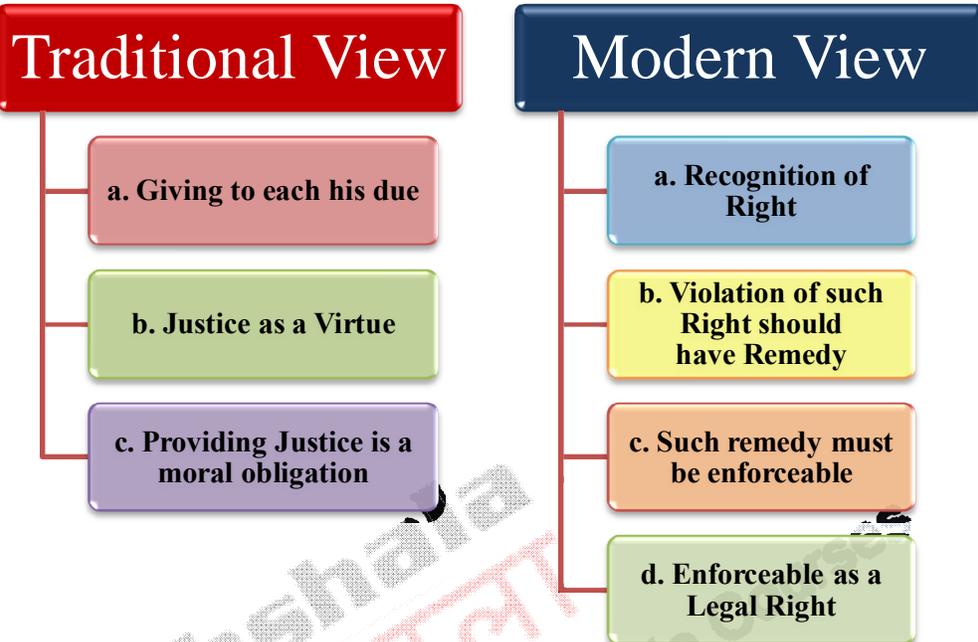
This means that for justice to be realized, the right holder would require a remedy. A remedy as defined in Black's Law Dictionary, is the means by which a right is enforced or the violation of a right is prevented, redressed, or compensated. Hence the existence of a remedy is crucial to the enjoyment of a right conferred by the law. Without a remedy the enjoyment of the right becomes meaningless. From this it follows that it is necessary that effective means of access to justice are provided to the right holder so that his right is enforced. Where such means are provided, justice becomes real and meaningful. From the above it may be inferred that justice had acquired traditional meaning and a modern meaning. As discussed, justice in the traditional sense was seen as giving to each one his due. It was in this sense concerned with the adjustment of human relations. The modern view of justice denotes the existence of a right coupled with the provision of a remedy to enforce the right. According to the modern view, justice is about translating the right into action. Rights are enforced where effective means are made available and accessible as a part of the remedy.

Another important aspect which is noticed in the modern period is that the administration of justice came to be seen as one of the important functions of the State. With the emergence of the view that justice has to be rendered according to the law, the courts assist the State in enforcing rights as a necessary condition of peace, order, and civilization. In modern times, it is through the application of legal rules and procedure by the courts, that justice seekers can vindicate their rights.

In order to avail the remedy granted by the law, a justice seeker must approach the court of law. But in order that the court is able to dispense justice, the justice seeker must have an opportunity to present his case to the court. This means that courts must be accessible to justice seekers in order that they may be able to secure justice.

It is clear from the discussion above that the idea that justice was understood as a moral obligation or a religious mandate that got secularized in the modern period. In the modern period, justice was understood to mean the application by the courts of the formal rules enacted by a competent authority of the State. Thus from a mere moral obligation, justice developed into a legal obligation imposing on the States, the duty to respect a corresponding right in favour of its citizens.

The traditional view has thus given way to the view that law is a means to obtain justice and the courts by applying the law in a given case dispense justice to the parties. It is also clear that in accordance with the law, parties have to approach the courts for the vindication of their rights. This brings us to the importance of access to justice. Legal rights can be meaningful if they can be asserted through the remedies made available by law. It is only with effective access to justice that respect and protection of our rights can be guaranteed.



So the next question that needs to be answered is what is meant by access to justice?

#### 4. Concept of Access to Justice

Access to justice is a pre-requisite to secure the realization of rights. Where a person suffers the violation of his right, he needs a mechanism which can grant him relief or the redressal of his wrong. Without access, justice is merely an illusion. Access to justice demands that the State has put mechanisms in place which are capable of dispensing justice. These mechanisms are normally the courts of law. A person who has suffered the violation of his right may approach a court of law for justice to be done to him.

The importance of access of justice for both citizens and the State cannot be underestimated. It has to be remembered that access to justice is an essential element of the rule of law and therefore of democracy. The rule of law signifies that laws that are enacted by the competent authority are faithfully executed by officials; that individuals wishing to enforce the law should have reasonable access to the courts; that no person should be condemned unheard, and that power should not be arbitrarily exercised that orders of court are obeyed<sup>iv</sup>.

From the above it is clear that justice and its administration are significant requirements for the rule of law. The courts are the guardian of rights and enable people to protect their rights against infringement by other people or bodies in society. Actions against government to limit executive power and ensure that government is accountable are also important aspects of



the rule of law. It thus stands to reason that if people are unable to access courts to protect their rights, respect for the rule of law is diminished.

According to Prof. Upendra Baxi, access to justice signifies the ability to participate in the judicial process. Basically the definition focuses on an individual's ability to access courts. What needs to be examined is whether individuals are in a position financially or otherwise to avail of the remedy provided under the law in the event of a violation of his right.

In other words, the definition suggests that accessibility of a justice system is determined on the basis of the ability of an individual to approach the court and secure the effective redressal of his grievance. Accessibility in this sense signifies the absence of obstacles which hinder the effective enjoyment of the means of justice. Legal scholars have found that there a number of instances where people whose fundamental rights are infringed, may not practically be in a position to approach the court for relief.

Factors such as exorbitant costs, cumbersome-procedures, dilatory and time-consuming justice ,legal representation ,geographical distance are some among many factors that undermine the accessibility of courts as a dispute resolution mechanism.

*Exorbitant costs:* In several instances, many litigants fail to approach the courts in spite of the violation of their rights, due to high costs involved in litigation. The sheer expense of litigation hinders justice óseekers from obtaining justice.

*Cumbersome procedures:* Cumbersome court procedures often prevent justice óseekers from obtaining justice from courts. In determining claims of parties before it, the courts have to follow the laws of procedure for the purpose. Many of the procedures are time óconsuming and lay emphasis on several technicalities. This fact affects the speedy disposal of the suit.

*Dilatory and time-consuming justice:* Litigation before courts is generally time -consuming which causes many litigants to shy away from courts to obtain justice. Often the courts of law are situated in the towns and cities making it not only difficult for litigants from villages to approach them but also waste their time in getting there. In addition to this aspect, the delivery of justice under the adversarial system is a protracted and time consuming process. It is common knowledge that justice delayed is justice denied. There are several cases in which the litigants have not been able to taste the fruits of success in their life-time as the suit has not been finally disposed. As court litigation is prolonged, justice-seekers are deprived of its real effectiveness.

*Legal representation:* Courts of law follow certain legal procedures in the dispensation of justice. As litigants are not aware of the court processes or procedures, they have to seek and rely on lawyers to obtain justice on their behalf. While the presence of a lawyer is necessary for the purpose of facilitating the complex legal proceedings, sometimes lawyers themselves, inhibit justice by prolonging the matter of their clients by taking to recourse to appeals and



other procedures laid down in the law even where he does not stand a fair chance of winning the case for his client.

Another problem which emerges with the need of legal representation before the courts is that lawyers have a number of briefs of other clients, as a result of which their preparation in a particular case may be poor for which he may seek an adjournment. Such situations unwittingly lengthen the duration of a case before the court until its final disposal.

*Geographical distance:* Another factor that hinders the effective access of justice is the physical distance to the courts. With most of the courts being situated in cities and towns, it becomes a difficult task for persons living in the rural areas to approach the courts which are distantly located. In addition to having to bear the expenses of their travel, litigants have also to spend much of their time to reach their destinations.

*Inadequate number of courts:* There is an inadequate number of courts for dispensing justice to those seeking it. Although this is true of most countries, there may be exceptions where the situation is different. But in most countries including India, the number of courts established for the purpose of dispensing justice is not sufficient to cater to a large litigating population. As a result the judges in some of the courts are over burdened with cases and are unable to deliver justice promptly. Often, there are a number of unfilled vacancies of judges in the courts which also results in the congestion of the other courts that are functioning. This situation in turn makes the workload of existing judicial officers both tedious and laborious.

The factors mentioned above are some of the factors that hinder access to justice for litigants. Though not exhaustive, most of these factors either singly or cumulatively have an adverse impact on access to justice. This is not to say that these are the only factors that bring about the hindrance to justice. There are also other factors such as ignorance of the law and the fear of court proceedings that lead justice-seekers to think twice before they approach the courts.

#### **4.1. Traditional view on access to justice:**

For a long time, access to justice has traditionally been seen as access to the courts or the availability of legal assistance. Access to justice came to be viewed as meaning the ability of individuals to approach the courts for relief.

Courts as the dispensers of justice became central to discourses on access to justice. Efforts at reform centered mainly on courts and how attempts at better access could be carried out.

The above discussion demonstrates that effective access to justice is imperative and is important in order that justice is meaningfully realized. Without access to justice legal rights would remain merely theoretical, if the institutions charged with enforcing them are inaccessible. Several countries therefore consolidated their efforts to enact laws which would make courts more accessible. Thus with this end in view, efforts were stepped up to improve the accessibility of institutions and reform the law to provide more effective remedies. This view held sway in the latter half of the twentieth century which showed the direction of legal reform to be one with regard to improving the accessibility of courts.



Most disputes are resolved without recourse to formal legal institutions or dispute resolution mechanisms. It became increasingly clear that access to justice demands would not be fulfilled purely by emphasis on courts. The human rights movement which was gaining momentum following the establishment of the United Nations Organization in 1945 broadened the scope of access to justice which ceased to mean only access to courts. It was in this background that the traditional meaning of access to justice gave way to the modern view. It was clear that narrow approach of access to justice had its own difficulties.

#### 4.2. Modern view of access to justice

The realization that access to justice was more than mere access to courts, emerged gradually. It was clear that the establishment of courts would not by itself provide effective justice. In addition to courts, there was need to see that the litigants were in a position to approach the courts for justice. Merely setting up more courts would therefore not be sufficient. It would be necessary to ensure that access to justice was not impeded by factors such as geographical distance; cost, complex procedures, delay etc. would not pose difficulties for such litigants.

Realizing the importance its importance not just as a right in itself but as a means to enjoy the other rights conferred by law, access to justice finds its place in some Constitutions as a fundamental right and thus enjoys constitutional status.. At the same time, various international human rights instruments enshrine the right to free legal aid, the right to speedy trial, the right to a fair hearing and the right to a remedy, all of which enable access to justice to become more meaningful. The human rights documents have thus highlighted the obligation of the States to ensure that people are able to approach courts without being hindered either by financial or procedural rules and the reluctance to approach them on account of their slow pace. The law reform movement about four decades has brought in an enlarged meaning to access to justice. Accordingly, access to justice has come to be understood as including the right to free legal aid, the recognition of class actions and alternative dispute resolution processes.

*Right to free legal aid:* The right to free legal aid is an important component in which a person who belongs to the weaker sections of society and is unable to afford the cost of litigation, is entitled to free legal services by the State. It is the duty of the State to make available funds providing legal aid to persons who are poor and are of limited means in order to ensure that they are not deprived of opportunities to secure justice only on account of their poverty. By providing free legal aid to persons who are marginalized, the law seeks to bring the weaker party at par with the other litigants who are able to bear the costs of litigation. Free legal aid to the poor and marginalized members of the society is thus seen as an instrument to empower the disadvantaged sections to use the power of the law to advance their rights and interests as citizens in the realization of justice.

*Recognition of Class actions:* Traditionally, the right to approach the court for judicial redress is available only to a person who has suffered a legal injury because of the violation of his legal right. However, with judicial activism the traditional rule of locus standi or standing has



been relaxed by the court in certain circumstances, paving the way for Public Interest Litigation. In the case of public interest litigation the court does not insist on a regular writ petition. Thus procedural technicalities have not been allowed to come in the way of justice.

Where one who suffers the violation of his right is unable to approach the court due to poverty, illiteracy or for belonging to the disadvantaged sections of society, a public spirited citizen may bring an action on behalf of such person or class of persons which is understood as public interest litigation. Justice is thereby brought within the reach of the poor masses through class actions in respect of issues of public interest.

#### **Provision for alternative dispute resolution systems:**

The delay in obtaining justice from the courts has brought on the search for new and alternative forms of dispute resolution. Unlike courts, these forms are believed to be less time consuming, less costly and less cumbersome procedure. Alternative dispute resolution systems are a term that refers to various methods of resolving disputes outside the traditional legal and administrative forums. Alternative forms of dispute resolution hold out the promise of outcomes arrived at in an informal and non-adversarial atmosphere. In contemporary times, the law recognizes various forms of alternative dispute resolution such as arbitration, negotiation, mediation, conciliation and Lok Adalats (literally People's Courts) which enables the amicable settlement of disputes between parties.

The traditional view relating to access to justice discussed above has thus undergone change as it has received a more liberal understanding in recent times with three waves of reform movement.

In modern times, as discussed above, the meaning of the term access to justice has expanded to include not just access to courts but also the provision of efficient options for dispute resolution which enables the realization of justice. At present, access to justice is defined as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for their grievances. In simple words, it means that access to justice no longer views courts as the only justice dispensation mechanism but also has in contemplation alternative forms of dispute resolution as additional means to secure justice. Access to Justice has thus acquired a broad meaning so as to include access to appropriate forums of dispute resolution.

#### **5. Mechanisms for the administration of Justice:**

One of the essential functions of the State is the administration of justice. In order to achieve justice, certain mechanisms for its dispensation are a sine qua non. It is only through the mechanisms that dispense justice that rights are enforced. With the evolution of the welfare State justice dispensation has become one of its primary and essential functions. For this purpose laws which are enacted not only establish the rights and duties of citizens

The State carries out the dispensation of justice through courts which adjudicate and determine the rights of parties. Being creatures of the law they enjoy such powers and jurisdiction which the statute confers on them. Generally, depending on the legal systems, there are generally superior courts and the subordinate courts which citizens can approach directly for the violation of their fundamental rights. There are also special courts set up for specific purposes and also Tribunals to adjudicate on specific disputes.



Unlike the ancient period where justice may have been dispensed according to the whims and caprice of the rule in modern times, it is significant to find that justice is dispensed by courts in accordance with the law. The courts apply the law to the case before them in order to ensure that justice is done to the parties before it.

In addition to the formal dispensation of justice which is done by the courts there are also informal methods of resolving disputes between parties. The settlement of disputes by arbitration, mediation, conciliation and Lok Adalats has received acceptance and statutory recognition in most countries which face the problem of access to justice. Thus parties have the option to get redressal for their legal problem by either approaching the formal courts of law or by referring their dispute to any of the modes of alternative dispute resolution. Thus in recent times, access to justice has been enlarged to include more groups of justice seekers, who were at one point of time deprived of the benefits of justice.

#### 6. Concerns:

Access to justice has in recent times received an expanded meaning. Nonetheless, justice continues to elude thousands of justice seekers who approach the courts every day. In spite of a broad meaning and efforts at reform, several litigants still continue to find it difficult to approach the courts. While access to court has in recent times evolved into a human right, there is much left to be done to make access to justice more meaningful.

#### 7. Summary

This chapter attempted to provide an understanding of the concepts of justice and access to justice. It is clear that justice was, is and will continue to be cherished ideal for all human beings irrespective of their race, country, religion age or gender. For justice to be effectively realized, access to it is important. The chapter also provides an insight into the journey of justice from a moral obligation to a legal obligation. Access to justice has thus evolved to the status of a significant human right.

Access to justice has acquired two meanings of the traditional and the modern meaning. While the traditional meaning is limited in its understanding as being access to courts, according to the modern view, access to justice is more than just access to courts. It has come to mean access to formal as well as informal justice mechanisms. This view intends to do away with the various factors that obstruct justice and restrict its effectiveness.

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<sup>i</sup> Holland and Schwarzenber, Law, Justice and Equity, (1967) 1.

<sup>ii</sup> <http://www.iep.utm.edu/justwest/>

<sup>iii</sup> Clause 40 of the Magna Carta states *Nulli vendemus, nulli negabimus, aut differimus rectum aut justiciam avaialbale* at [www.bsswebsite.me.uk/history/MagnaCarta](http://www.bsswebsite.me.uk/history/MagnaCarta)

<sup>iv</sup> Justice F.M. Ibrahim Kalifulla *RULE OF LAW & ACCESS TO JUSTICE* available at <http://hcraj.nic.in/joc2014/16.pdf>