

Subject: Law

Production of Courseware

 **- Content for Post Graduate Courses**



Paper : Access to Justice

Module : Access to Justice Under Constitution of India



Component - I - Personal Details

Role	Name	Affiliation
Principal Investigator	Prof(Dr) Ranbir Singh	Vice Chancellor National Law University Delhi
Principal Co-investigator	Prof(Dr) G S Bajpai	Registrar National Law University Delhi
Paper Coordinator	Dr. Bharti Yadav	Assistant Professor National Law University Delhi
Content Writer/Author	Dr. Bharti Yadav	Assistant Professor National Law University Delhi
Content Reviewer	Prof B B Pande	Visiting Professor National Law University Delhi

Component - I (B) Description of Module

	Description of Module
Subject Name	Law
Paper Name	Access to Justice
Module Name/Title	Access to Justice Under Constitution of India
Pre-requisites	Understanding the concept of Access to justice, Various statutory provisions regarding Legal Aid.
Objectives	- To understand the need of special provisions for access to justice in India - To know the different Constitutional provisions providing for equal access to justice in India - To know the judicial trend in India for promoting equal access to justice.
Keywords	Justice, Access to Justice, Constitution, Fundamental Right, Directive Principal



Access to Justice under the Constitution of India

Introduction:

Peace and harmony is very essential for the growth and development of a nation which can be ensured through fair administration of justice. In a welfare State like India where people are known for its diversity, it is the obligation of the State to ensure equal administration of justice as it is a sine que non of fair administration of justice. To promote equal administration of justice irrespective of economic or other disability, the concept of free legal aid emerged. It promotes the saying that justice should not only be done but seem to be done. Another hurdle in the path of administration of justice is delay, cumbersome process and high litigation cost. These problems become more complex when a person who comes before a court for protection is poor, illiterate or ignorant about his rights. Failure to get easy, cheap and expeditious justice shakes the very faith of people in justice administration system.

The founding fathers of the Constitution of India had taken a positive approach towards doctrine of equal justice, which becomes apparent on the plain reading of the preamble of the constitution. It provides for justice in all its forms- social, economic and political. This preamble promise is further strengthened by provisions in Articles 14, 21, 22(1), 32, 39-A, 38, 41, 46, 142, 226 and 282 of the Constitution of India.



Right to Equality & Access to Justice:

Preamble of India provides for securing all citizens equality of status and opportunity along with justice-social, economic and political. Both the objectives have inter-connection. Equality promotes justice and justice promotes equality. We cannot expect justice without the support of equality. Equality in a country like India where differences among people prevail because of Social, Economic and Political factors is a far cry without the support of provisions like legal aid. Legal aid brings less advantageous people at par with affluent counterpart so that they could get equal opportunity to seek justice.

Apart from preamble access to justice also get assistance from fundamental rights. Fundamental rights enshrined in part III of the Constitution are the tools to achieve the



objectives laid down in the preamble. These are basic, natural and inalienable rights which are essential for growth and development of human beings which ultimately lead to growth & development of a nation. Articles 14, 21, 22, 32 and 226 provides for the free legal aid.

Article 14 provides that the State shall not deny to any person equality before the law or the equal protection of law within the territory of India. Article 14 uses two expressions "equality before the law" and "equal protection of law". Equality before law is taken from England and equal protection of law is taken from American Constitution. Both these terms appear same but they have different meaning. Equality before law provides that everybody is equal before law irrespective of position and economic resources on the other hand equal protection of law provides a helping hand in terms of special provisions to those people who are at less advantageous position so that they could avail the benefits of law as their affluent counterparts are availing and equality before law could be maintained.

In India because of illiteracy, ignorance, poverty and lack of faith in judicial system people do not get equal opportunity to get fair justice as their educated and affluent counterparts get. So provision like free legal aid becomes very essential to provide them equal protection of law which is a fundamental right of every person.

Audi Alteram partem:

Another supporting provision which is implicit in right to equality is the principle of Audi Alteram partem. It means the other party must be heard. This principle is implicit in Article 14 which is a fundamental right of every person. So it is the duty of the State to ensure every person proper representation before Court irrespective of his means or knowledge. Free legal aid is implicit in Article 14.

Right to life and Access to Justice:

Article 21 of the Constitution provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. The Supreme Court in **Menaka Gandhi V. Union of India**¹ held that under Article 21 life and liberty of a person can be taken away only by the procedure established by law. The procedure which can take away life and liberty of a person should be just, fair and reasonable. Any procedure established by law which does not provide for free legal aid for poor and illiterate people to ensure fair representation before court can not be treated as just, fair and reasonable. So the hon'ble Supreme Court widened the scope of Article 21 to include provisions of free legal aid in it.

The Hon'ble Supreme Court reaffirmed its stand in **Hussainara Khatoon IV V/s. Home Secretary**² to include right to free legal aid in Article 21. The right to free legal service is clearly an essential ingredient of just, fair and reasonable procedure which can take away the life and liberty of a person accused of an offence. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of

¹ AIR 1978 SC 597

² (1980) 1 SCC 98



reasons such as poverty. The state is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the need of justice so require. Provided the accused person does not object to the provision of such lawyer.

Again the hon'ble Supreme Court reaffirmed the obligation of State to provide free legal aid to poor person in **M.H. Hoskot V. State of Maharashtra**³ by giving similar decision. It stated that if a prisoner is unable to exercise his constitutional and statutory right of appeal including special leave to appeal for want of legal assistance, then it is the obligation of the court under Article 142 read with Article 21 and Article 39A of the constitution to assign counsel to the prisoner provided he does not object to the lawyer assigned by the court.

Similarly in **Sukh Das v. Union Territory of Arunachal Pradesh**⁴, It was held that Free legal aid at the State's cost is a fundamental right of a person accused of an offence. This right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21.

Obligation to Inform the Right to Legal aid:

Right to legal aid cannot be denied to him on the ground that he failed to apply for it. The magistrate is under an obligation to inform the accused about this right and to inquire about his wish of legal representation at the State's cost, unless he refused to take advantage of it.

In the case of **Mohd. Ajmal Amir Kasab vs. State of Maharashtra**⁵ the hon'ble Supreme Court directed all magistrates in India to discharge their duty of informing about free legal aid. It was held that the right to legal aid, consult and defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a magistrate. So It is the duty and obligation of the magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. All the magistrates in the country were directed to faithfully discharge the aforesaid duty and obligation Any failure to fully discharge the duty would amount to dereliction in duty and would make the concerned magistrate liable to departmental proceedings.

Assistance by competent Advocates:

Legal Aid to accused persons without means in all cases tried by a court of session, is a mandatory constitutional necessity, it is further necessary that such lawyer should be

³ AIR 1978 SC 1548

⁴ AIR 1986 SC 99

⁵ (2012)9 SCC 1



competent. Indigence should never be a ground for denying fair trial or equal justice. Therefore, advocates competent to handle cases should be appointed.⁶

To provide free legal aid in true sense we need to have well trained lawyers willing to perform free legal aid. It is possible if there are adequate number of colleges with necessary infrastructure, good teachers and staff. Since the government is unable to establish adequate number of law colleges, it is the duty of government to permit establishments of duly recognised private law colleges and afford them grant in aid on the similar lines on which it is given to government recognised law colleges. This would facilitate functioning of these colleges efficiently and in a meaningful manner. These colleges will turn out sufficient number of well trained or properly equipped law graduates in all branches year after year. This will in turn, enable the State and other authorities to provide free legal aid and ensure that opportunities for securing justice are not denied to any citizen on account of any disability.⁷

Access to justice during arrest and detention:

Another supporting constitutional provision which supports the access to justice is Article 22. It requires certain procedure to be followed at the time of arrest and detention which is the very basic requirement of just, fair and reasonable procedure established to take life and liberty of a person. It states that no person who is arrested should be detained in custody without being informed as soon as may be of the grounds for such arrest nor shall he be denied the right to consult and to be defended by a legal petitioner of his choice. The right to consult and to be defended by legal practitioner of his choice is a fundamental right of every person without any qualification of affordability under Article 22. Therefore, it is the duty of State to provide legal representation even if a person can't afford to pay the advocate's fees.

The right to consult and be defended by a legal practitioner of his choice is guaranteed with a view to enable the detainee to prepare for his defense. This right belongs to the arrested person not only at the pre-trial stage, but also at the trial before a criminal court or before a special tribunal and whether the arrest is made under the general law or under a special statute.⁸

Enforceability of Right to Access to Justice:

If a State fails to fulfil its obligation to provide legal assistance to those who cannot afford it, which is the fundamental right, the aggrieved party can get it enforced under Article 32 or Article 226 of the Constitution by approaching the apex court or the concerned High Court.

⁶Ranjan Dwiwedi V. Union of India, AIR 1983 SC 624

⁷State of Maharashtra V. Manubhai Pragaji Vashi, (1995)5 SCC 730

⁸State of M.P. V. Shobharam AIR 1966 SC 1910



Article 32 provides the right to move the Supreme Court for the enforcement of the fundamental rights provided under the Constitution of India. The Supreme Court shall have power to issue directions or orders or writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari, whichever may be appropriate, for the enforcement of the fundamental rights.

It is one of the highly cherished rights. It is very important and integral part of the basic structure of the constitution. It gives Supreme Court a status of the protector and guarantor of Fundamental Rights as it provides for the enforcement of fundamental rights in case of infringement. This right puts stress on the obligation of State to protect fundamental rights. It is true that a declaration of fundamental right is meaningless unless there is effective machinery for the enforcement of the rights. It is the remedy which makes the right a reality. If there is no remedy there is no right. Article 226 also provides similar right as provided under Article 32 but it is not a fundamental right. Its scope extends to fundamental rights as well as non-fundamental rights.

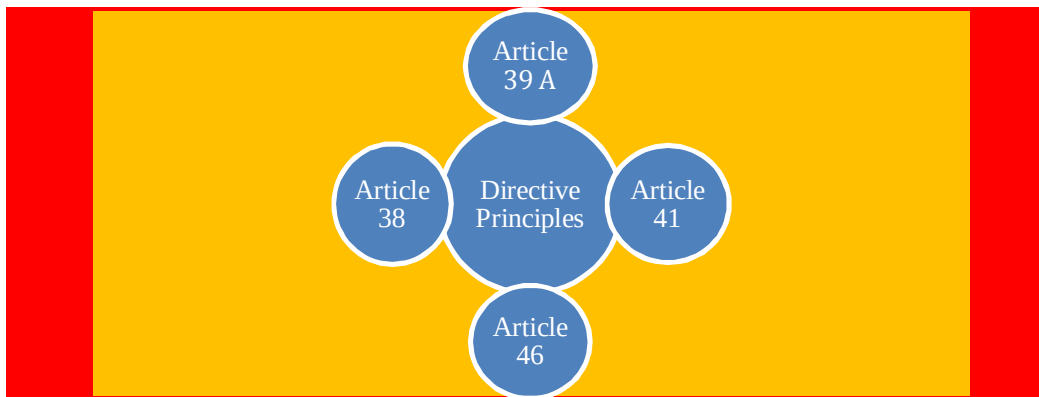
Rule of Locus Standi & Access to Justice:

In our country people because of poverty, illiteracy or ignorance are not in a position to apply for enforcement of their fundamental rights, so Constitutional remedies not only provides for enforcement of fundamental rights but also facilitate the enforcement of rights through Public Interest Litigation. According to the traditional rule of locus standi, only the aggrieved person can file a case for the enforcement of his right, so this rule of locus standi, was liberalised to allow public spirited persons or organizations to file cases for redressal of grievances of poor and illiterate persons. This concept of social action litigation in India was initiated by Krishna Iyer J. in **Mumbai Kamgar Sabha V. Abdullahai**⁹.

⁹ AIR 1976 SC 1455

Guiding principles promoting access to justice:

The relevance of Equal access to justice is not only supported by fundamental rights but also by directive Principles enshrined in part IV of the Constitution. They are not enforceable like fundamental rights but they are the guiding principles for governance of welfare State. Article 38, 39A, 41 & 46 though not enforceable but has aptly guided the promotion of equal access to justice in India.



(a) Welfare of People & Access to Justice:

The State is under an obligation to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice- social, economic & political, shall inform all the institutions of the national life.¹⁰ Under Article 38, State is directed to strive to minimize the inequalities in income, To eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

Legal aid comes within the ambit of Article 38 as it diminishes the inequality due to economic factor and tries to bring equal opportunity of availing legal services irrespective of its affordability.

(b) Right to Free Legal Aid and Access to Justice:

Article 39-A provides that State shall secure the operation of the legal system which promotes justice, on a basis of equal opportunity, to provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Article 39-A promotes justice on the basis of equal opportunities. It imposes an imperative duty upon the State to provide free legal aid to the poor. The Parliament of India in discharge of its obligation under Article this Article enacted The Legal Services Authorities Act, 1987 which provided for free legal aid. The 42nd amendment which inserted Article 39A also

¹⁰ Article 38, constitution of India



made some changes in schedule 7 of the Constitution of India. It removed the entry 3 that is administration of justice from State list and added it under concurrent list as entry 11-A. The object behind such change was to enable both union and State to make laws for legal aid and promotion of equal access of justice.

(c) Right to public assistance and access to justice:

The State is required under Article 41 of the constitution of India to provide for the public assistance in cases of undeserved want within the limits of its economic capacity and development. So State is under an obligation subject to its economic capacity to provide free legal aid to poor, illiterate or ignorant people.

(d) Weaker section of society and Access to Justice:

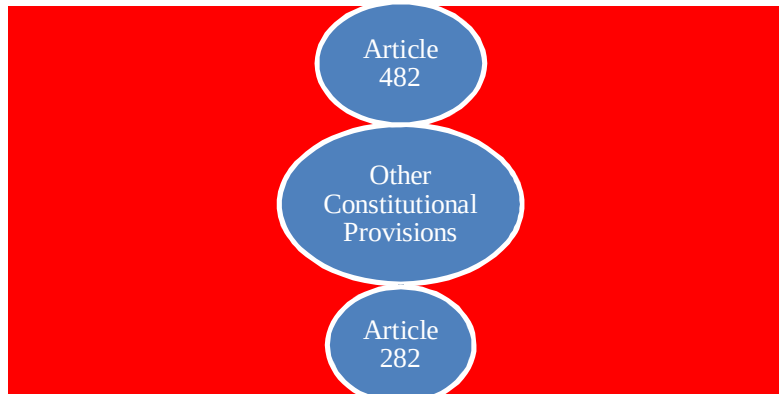
The State as per Article 46, is under an obligation to promote with special care the educational and economic interest of the weaker section of the people, and in particular, of the schedule castes and the schedule tribes to protect them from social injustice and all forms of exploitation.

In this way the this Article has scope to bring within its ambit the obligation of State to make laws for providing free-legal aid to weaker sections of society including SC/ST so that they could avail equal access to justice which is essential for preventing social injustice and exploitation.

(e) Provision for funds for promoting access to justice:

Apart from preamble, Fundamental rights and directive principles, other Constitutional provisions also support the importance of legal aid and casts a duty on the State to provide legal aid to needy people.

Article 282 provides that Union or a State may make grants for any public purpose . So under the preview of this Article the Union or the State can give grant for providing free legal aid, spreading legal awareness etc. which is a public purpose.



(f) Residuary power to promote access to justice:

The Article 142 (1) has been providing assistance in promoting access to justice in India. It provides that in the exercise of its jurisdiction the Supreme Court may pass such decree or make such order as is necessary for doing complete justice in any court or matter pending before it. It helped the Supreme Court in providing equal access to justice till there was no separate enactment for free legal service by interpreting the provisions of preamble, fundamental rights and directive principles in such a way as to bring free legal aid within the scope of fundamental right. Now when we have separate enactment called Legal Services Authorities Act 1987 it is helping Supreme Court to interpret the provisions of this Act in such a way that its object of providing equal access could be achieved in true sense.

Conclusion:

It is now evident from above explanation that equal access to justice has very strong Constitutional backing from preamble, fundamental rights, directive principles and many other Articles of Constitution of India. Indian Judiciary and Parliament of India has also played pro-active role in effective implementation of these constitutional provisions. Various landmark judgments of Hon'ble Supreme Court and High Court have interpreted constitutional provisions in such a way so as to bring access to justice within its ambit. Enactment of Legal Services Authorities Act, 1987 has actually contributed in bringing right to access to justice closer to reality.