ECONOMICS OF JUSTICE IN KERALA

THESIS SUBMITTED TO THE COCHIN UNIVERSITY OF SCIENCE AND TECHNOLOGY FOR THE AWARD OF THE DEGREE OF

DOCTOR OF PHILOSOPHY

IN ECONOMICS UNDER THE FACULTY OF SOCIAL SCIENCES

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JANUARY 1995

ACKNOWLEDGEMENT

I express my sincere gratitude and obligation to my Supervising guide, Dr. P.Sudarsanan Pillai, Reader, School of Management Studies, Cochin University of Science and Technology, for his brotherly affection and true commitment for completion of my research. Without his proper guidance, I would not have completed the research.

I am extremely grateful to Dr. K.C. Sankaranarayanan, Professor and Head of the Department of Applied Economics, who has been a source of intellectual inspiration throughout my study.

I wish to place on record my sincere thanks to Dr. Jayakumar, Professor and Head of the Department of Law, University of Kerala for his very valuable advice in this research. I am greatly obliged to Dr. L. Varkey and other faculty members in the Department of Law, Cochin University of Science and Technology for their support and encouragement in my research.

I had the benefit of discussing some of the basic issues of this study with Hon'able Justice V.R. Krishna Iyer. I would like to express my heartfelt thanks to him. Several experienced and distinguished legal professionals have sincerely responded to the research issues raised in the study. Advocate K.G.N. Namhoodiripad is of special mention in this context.

I place here on record my sincere thanks to Dr. M.K. Sukumaran Nair and other faculty memebers in the Department of Applied Economics for their encouragement in my research.

I express my sincere thanks to Mr. K.M. George, Mr. P. Martin and Mr. Zacharias Thomas for their co-operation.

I am greatly obliged to the Management and the Principal Rev.(Dr.) George Madathiparampil, of St. Berchmans' College for granting me a fellowship for one year under F.I.P for completing the course. Prof. C.O. Abraham, Prof. Joy Kurian, Prof. M.S. James and Prof. K.E. Paulose have shown genuine interest in my research.

In the course of my research I have made use of the facilities of Centre for Development Studies, Tvm.;British Literary, Tvm; Kerala University LIbrary, Tvm.; Law College Library, Tvm.and Ekm.; the High Court Library; Law College Library Ekm.; Library in the Department of Indian Legal Thoughts, M.G. University, Kottayam and the Library in the Department of Law, University of Kerala and I am highly benefited from the library in the Faculty of Law, Cochin University of Science and Technology. I sincerely acknowledge the assistance rendered by the librarians of all these libraries. I am greatly indebted to Miss. Elizabeth, Librarian, Department of Applied Economics for her valuable assistance.

It would not have been possible for me to complete the study without the support and assistance from my family members. My words can't sufficiently express my obligation to my beloved wife.

I wish to place on record my thanks to the Centre for Research and Consultancy for efficient and neat execution of the computer work.

Finally, I thank the Divine Invisible Hand.

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CERTIFICATE

Certified that the thesis "Economics of Justice in Kerala" is the record of bonafide research carried out by Shri. Jose K. Joseph under my supervision and guidance. The thesis is worth submitting for the degree of Doctor of Philosophy in Social Sciences.

P. SUDARSANAN PILLAI
Supervising Guide

DECLARATION

I declare that the thesis "Economics of Justice in Kerala" is the record of bonafide research work carried out by me under the supervision of Dr.P. Sudarsanan Pillai, Reader, School of Management Studies, Cochin University of Science and Technology, Kochi-22. I further declare that this thesis has not previously formed the basis for the award for any degree, diploma, associateship, fellowship or other similar titles of recognition.

Kochi, JOSE K. JOSEPH

05/01/1995.

CONTENTS

LIST OF TABLES

CHAPTER 1

INTRODUCTION

Legislation on economic issues is as old as legislation itself. Ancient law like the laws of Hammurabi, the Roman Laws, Common law in England, the laws of the Tudors on monopolies, the legislation by the enlightened despots of the 18th century in Europe, had an economic objective in view. The modern trend in economic legislation began with English legislation in the 19th century embodying the teachings of Adam Smith's system of natural liberty, which is enshrined in his `Wealth of Nations'. Then came Ricardo with his Theory of Rent. When Malthus introduced the Theory of Population, people were anxious about the growth of population as a threat to economic well-being and has accounted for all legislation and administrative regulations for reducing population growth. The utilitarian J.S. Mill's Systems of Political Economy influenced the parliamentary legislation of Ireland in favour of tenants and landlords. According to Marshall, man's economic behaviour was based upon the delicate balance between the search for satisfaction and the avoidance of sacrifice.

He advocated the cause of trade unions, a minimum wage and a provision of employment by the state if and when necessary.

J.M. Keynes in his 'Theory of Employment' emphasises the importance of public expenditure in times of depression, and pumping money in times of slump and restriction of money flow in times of boom. After the Second World War, economists have been grafted into the departments of governments especially in financial legislation[1].

The inter-relationship between legal and economic forces can be traced from very ancient times. Evolution of economic doctrines from the very beginning reveals the significance of the economic aspects of the legal process. For attaining peace and prosperity in any society, justice has to be its basis. Justice is a relative term varying in dimensions of time and place. Law is the instrument for delivering justice. Rules of conduct enforced by the state to maintain peace and order in society are called 'laws'. Laws attempt to provide security and uniformity by regulating human

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[1] Ruthanasway. M. Legislation: Principles and Practices D.K. Publishing House 73-B, Anand Nagar, Delhi, 1974.

actions. Enforcement of law is imperative for any civilized society.

There are different branches of law, such as criminal law, civil law etc. Civil law ensures the assertion or enforcement of civil rights and civil remedy i.e., damages obtainable in a court of civil jurisdiction. The need for an economic approach to civil justice arises from the fact that the use of economic resources in the suits are desirable only when the benefit from the litigation exceeds the cost. Since property being a legal-economic concept, the economic evaluation of private property litigations may explore the legal-economic nexus in the doctrinal as well as policy formulation spheres.

The focus of the present study is on issues related to Legal-Economics. The economic approach to legal issues is based on the belief held by both legal professionals and economists that law and economics are complementary disciplines and that collaboration is highly beneficial.The principles of economic analysis can help our understanding of the law. Economic approach has important effects on the costs

and benefits that prospective litigants may expect from litigation and their decisions to litigate or to settle out of court. Economic consideration is also helpful to understand the significance of litigation costs, the practical problems of legal administration and the provision of legal services[2]. The economic approach to law is mainly based on the belief held by some economists that the core of economics, the theory of choice, is in principle applicable to all human and institutional behaviour[3].

Statement of the Problem

The main purpose of enforcement of civil rights by litigants is to enjoy economic benefits. The general belief among litigants is that while enforcing their civil rights they may be able to enjoy economic benefits. If litigation costs exceed the expected benefit, it is unwise on the part of the litigant to use economic resources in the course of legal

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2 Roger Bowles, Law and the Economy, Martin Robertson, Oxford, 1982

3 Mackenzie R.B."On the Methodological Boundaries of Economic Analysis", Journal of Economic Issues, 12, No. 6, 1978, pp.627-645.

proceedings. When a litigant undertakes an act of litigation, he has to incur different types of costs. An average litigant in Kerala is only considering the direct litigation costs as given in the Civil Rules of Practice in Kerala. According to the Civil Procedural Approach to litigation costs, a litigant is not estimating the indirect, hidden, and opportunity cost of litigation. An accountant also will consider only the cash payments and charges paid by the litigant to the suppliers of legal services. An economist's approach to litigation costs may highlight the real costs involved in litigation and traces the major issues related to the accelerating trend in litigation costs.

The logic of litigant's behaviour in an economist's view is rational decision-making. Before taking a decision to litigate, the party will have to compare the costs involved in going for a litigation with the benefits from doing so. In the process of rational decision-making the litigant has to consider and compute the real litigation costs. The litigant has to spend a certain amount of money for his litigation. If the money expended by the litigant in his own litigation had been invested elsewhere, he would have earned a certain amount

of interest or dividends. Moreover, a litigant devotes time to his litigation and contributes managerial ability to it. If the litigant had not entered into his own litigation, he might have sold his services to others for some concrete material benefit. Hence, for an economic evaluation of cost and benefit in litigation, both accounting and opportunity cost should be estimated and the real cost structure could be exposed. The opportunity cost of litigation can be given a money value. For example, the factors which are used for a litigation may also be used for commencing a new business. Thus, the opportunity cost of the litigation is the business enterprise forgone or sacrificed, which could have been conducted with the same amount of factors that have gone into the litigation.

Private property can be considered as the basic Legal-Economic logic of any system. The present study is an attempt to evaluate the individual litigations in private immovable property related to land and buildings, which are capable of economic evaluation.

Objectives of the Study

The main objectives of the present study are listed below.

1. To develop a Model for studying the micro economics of litigations in Kerala.
2. To identify the major cost-raising factors in litigations in Kerala.
3. To study the micro cost-benefit structure of private immovable property litigations in Kerala.
4. To examine the decision making behaviour of litigants.
5. To propose suggestions and recommendations for reducing litigation costs.

Scope of the Study

Enquiries reveal that no specific study has so far been conducted in Kerala on the micro economic characteristics of litigations. Hence the present study is a modest attempt to analyse the economics of private immovable litigations during the ten-year period between 1980 and 1990. Since the

study is confined only to the micro cost-benefit aspects of individual litigations, litigations between individuals and individuals are only considered.

Methodology

The study is explorative in nature and is mainly based on primary data. Two-way primary level enquiry have been conducted, using pre-tested schedules and questionnaires, to collect first hand information regarding litigation costs. Surveys were conducted among both individual litigants and legal professionals. These surveys were conducted in the four districts of Kerala viz. Thiruvananthapuram, Kottayam, Ernakulam and Malappuram. These four districts have been selected for giving proper geographical representation. The population of the study is informed litigants who have completed graduation and above thirty five years of age. The population size is fixed as 8000 litigations in private immovable property. Four hundred cases were selected to collect details: 90 litigations from Thiruvananthapuram, 172 from Kottayam, 88 from Ernakulam and 50 from Malappuram. Stratified sampling method was followed in the selection of

sample groups. Number of samples were selected from each district according to the total number of cases in each district. The number was arrived at after detailed consultations with leading civil lawyers in the four districts and by verifying the administration reports of the civil justice in Kerala published by the Government of Kerala. All the relevant information for the study such as cost-consciousness, financial status of litigants, nature of litigation, period of litigation, direct cost, indirect costs, hidden costs, opportunity costs etc. have been covered in the questionnaire.

Data was also collected from legal professionals. From 500 leading legal professionals who have more than twenty years of experience in the private immovable property litigations, 200 were selected to collect details, 50 from each district. Information also gathered from distinguished judicial officers and other knowledgeable parties connected with litigations.

The study has also made use of data from the following secondary sources.

1. Reports of Law Commissions of India.
2. Law Ministry of Government of Kerala.
3. The High Court of Kerala.
4. Subordinate Courts in Kerala.
5. Offices of the Leading Advocates in Kerala.

An attempt has been made to develop a Model for evaluating the micro costs and benefits associated with the litigations and to empirically verify the economic rationale of litigations. The Model is explained in detail in Chapter IV.

As a prelude to the empirical exercise, the institutional frame work of the Judiciary is studied in a historical perspective, which is helpful to understand the procedural aspects of administration of civil justice in Kerala.

Limitations of the Study

In this study it is assumed that a consumer of legal services is rational. Non-monetary issues related to suits are not considered in this study. Cases were taken only from the subordinate courts in the four districts such as Thiruvananthapuram, Kottayam, Ernakulam and Malappuram. As the litigations in the High Courts are mainly issues involved in questions of law, the study does not include suits decided by the High Courts. It is practically not possible to determine the real money value of private immovable property and to compute the real money value of litigation cost. Hence discounting method is not used. The study is confined only to the individual litigations related to land and buildings.

Operational Definitions

In this study 'justice' refers to justice in private immovable property litigation and the term 'litigation' refers to private immovable property litigation. 'Cost' refers to micro cost and benefit to micro benefit of private immovable property litigation.

Scheme of the Study

For the purpose of analysis, the study is divided into seven chapters.

Chapter One deals with the introduction. It consists of statement of the problem, objectives, methodology, limitations etc. The first chapter provides a structural background of issues analysed in subsequent chapters.

The Second Chapter introduces Legal Economics and discuss the major trends in the literature on economic analysis of law. This chapter incorporates the economic background of basic legal issues with particular reference to the private property litigations.

Chapter Three seeks to focus on the conceptual issues in justice and discusses the history as well as the nature of civil justice administration in India. This chapter also emphasises the legal and economic issues involved in the concept of property.

Chapter Four provides the theoretical framework for analysing the micro economics of litigations. This chapter introduces the various tools and techniques existing in the economic analysis of law and presents the Model developed for the study.

Chapter Five deals with the conceptual and computational aspects of the cost-benefit structure of litigations with special emphasis on opportunity costs.

Chapter Six focuses on the cost-benefit analysis of litigations.

Summary, findings and prospects of the study are presented in the Seventh Chapter.

CHAPTER II

ECONOMIC APPROACH TO LEGAL ISSUES: A REVIEW

The purpose of this chapter is to introduce the main issues in the economic analysis of law and their empirical applications. The major trends in the literature are analysed, based on the following theoretical areas.

1. The Legal-Economic Nexus
2. Positive Economic Analysis of Legal Issues
3. Normative Economic Analysis of Legal Issues
4. Economic Analysis of Law
5. Positive Economic Theories of Law
6. An Alternative Economic Approach

The history of a society can be viewed as a balancing effort between the natural order and economic environments. Law and legal institutions have profound influence on an economy and the economy in turn influences them. This inter-relationship between legal and economic forces can be traced from the very ancient times.

The economic approach to legal issues hinges on the faith among both legal professionals and economists that law and economics are complementary disciplines and that collaboration is potentially beneficial. Since the present study falls in the area of Legal Economics or Law and Economics it is useful to explore the basic legal-economic nexus and its applications.

The Legal-Economic Nexus

The legal-economic nexus embodies the idea that law and economy are not self-subsistent spheres; rather, economy is a function of law and law is a function of economy, and this functional relationship is one of simultaneous joint products. Economy is a function of law in the sense that law gives rise to rights, which in turn determine the allocation of resources, the distribution of income and wealth, and the power structure of society. Law is a function of economy in that many of the issues that come to law are economic in origin, reflecting attempts to change or protect certain

economic interests.[1] All laws may have economic side effects. But the law relating to property, employment, production, trade, innovation, monopolies, distribution of income and consumer protection etc. may have explicit economic impact on the economy. Laws change economic infrastructure through legislation and direct the main economic activities viz. production, distribution, consumption and exchange.[2] The concept of social control of business might be utilized as the point of departure for an analysis of legal-economic inter-relations and it can be observed that many problems which the courts undertake to solve in reality are economic problems more strictly than they are legal problems.[3] The principles of economic analysis can aid our understanding of the law. Economic considerations are seen to have varied and widespread effects on the costs and benefits that prospective litigants may expect from litigation and on their decisions to

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1 Steven G. Medama "Probing the Legal-Economics Nexus Takings, 1978, 1988" Journal of Economic Issues Vol. XXVI No.2 June 1992, p.526.

2 Oliver J.M, Law and Economics , George Allen and Unwin Ltd., London, 1979 p.1.1

3 Huntington Carins, Law and the Social Sciences, London Kegan Paul, Trench, Trubner & Co. Ltd. New York: Harcourt, Braee and Company, 1935, p.122.

litigate or to settle out of court. Economic approach is also helpful to understand the significance of litigation costs, the practical problems of legal administration and the provision of legal services.[4] "The economic analysis of law involves three distinct but related enterprises. The first is the use of economics to predict the effect of legal rules. The second is the use of economics to determine what legal rules are economically efficient, in order to recommend what the legal rules ought to be. The third is the use of economics to predict what the legal rules will be. Of these, the first is primarily an application of price theory, the second of welfare economics and the third of public choice."[5]

The marrying of economics and law is not new. Economic approaches to law can be found in the works of

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[4] Roger Bowles, Law and the Economy, Martin Robertson, Oxford, 1982.

[5] The New Palgrave A Dictionary of Economics Ed. by John Eatwell Murray Milgate and Peter Newman The Macmillan Press Ltd. 1987, Vol. I p.144

Beccaria-Bonesara[6], Bentham[7], Marx[8] and in the illuminating work of the American Institutionalist School, particularly of Commons.[9] During the period between 1920 and 1960, the economic study of law and institutions fell into disrepute, although the intersection between law and economics continued in areas where the law had obvious economic objective or effects, eg. antitrust, competition, and trade policy and regulation. The resurgence in the economic analysis of law came from a number of sources. The work of Becker, G.S[10] on discrimination although not specifically law related, provided the initial step in generalizing neoclassical economics to

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6 Beccaria-Bonesars .C., An Essay in Crime and Punishment, Oceania - Pub., New York, 1764.

7 Bentham J., An Introduction to the Principles of Morals and Legislation", Oxford, Clarendon Press, 1789.

8 Marx K. Das Capital, London: Dent 1867.

9 Commons J.R. Legal Foundation of Capitalism, Macmillan, New York, 1924.

10 Becker, G.S., The Economics of Discrimination, University of Chicago Press, 1957.

non-market behaviour. The early work of Alchian[11] and Demsetz[12] on property rights. Calabresi[13] on tort and Coase[14] on nuisance represent the building blocks on which the new law and economics now rest.[15]

The economic approach to law is part of wider development which has resulted from the belief held by some economists that the core of economics, the theory of choice, is in principle applicable to all human and institutional behaviour.[16] "When time and means for achieving ends are

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11 Alchian A.A., "Some Economics on Property Rights", Rand Paper No. 2316, 1961.961.

12 Demsets, "Toward a Theory of Property Rights", American Economic Review, 1969. (papers and proceedings), 57, No.2, p.347-359

13 Calabresi G., "Some Thoughts on Risk Distribution and the Law of Torts", Vale Law Journal, 70, No.4, 1961, p.499-553

14 Coase R.H. "The problem of Social Cost", Journal of Law and Economics 3, No.1, 1960, p.1-44

15 Pawl Burrows and Cento G. Veljanvski: The Economic Approach to Law edited by Pawl Burrows and Centro G. Veljanovski, Butterworth, London Boston Sydney Wellington Durban Toronto, 1981

16 Meckenzien R.B., "On the Methodological Boundaries of Economic Analysis", Journal of Economic Issues, 12, No.6, 1978 p.627-645-6457-645-645

limited and capable of alternative application and the ends are capable of being distinguished in order of importance thenbehaviour necessarily assumes the form of choice.....it has an economic aspect".[17] The basic ideas contained in the economic approach to law are those of maximising behaviour or utility maximisation, stable preferences and opportunity cost[18].

Positive Economic Analysis of Legal Issues

Positive economic analysis is mainly used to make qualitative predictions and organise data for the empirical testing of these predictions.

The predictions of positive economic models must be interpreted with some care. These models only establish partial relationship. For example, one of the most common

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[17] Robbins L., An Essay on the Nature and Significance of Economic Science, Macmillan, London, 1932

[18] Becker G.S., The Economic Approach to Human Behaviour, University of chicago Press, 1976

predictions in economics is the inverse relationship between the price of a good and the quantity demanded. However, the statement must be read with an important caveat; it says that in practice the quantity demanded will decrease as price increases only if all other things remain constant in the system.

The methodology of positive economics as described above is one that lawyers find it difficult to accept. The main criticism which they are inclined to make is that the models are too simplistic and do not capture the full complexity of the legal phenomena which they seek to explain. This view usually expresses itself in the form of an attack on the unrealistic assumption of the economists' model. In response, the economists will argue that models are by their nature 'unrealistic', they are abstractions from not descriptions of, reality and that further more, it is not the models' assumptions that are to be verified but its predictions.

The techniques of positive economics are most relevant to "legal impact studies" or what Hirch has called

'effect evaluation'. Legal impact studies seek to identify and quantify the effects of law on measurable variables.[19] An example of this application is the positive economic analysis of crime.[20]

To the economist legal impact studies are a natural application of economic theory and empirical methods. They ask and attempt to answer the questions. What are the likely effects of the law ? Have they actually occurred ? Have the objectives of the law been attained ? Moreover the economist currently has a comparative advantage over the lawyers, because of his statistical training in answering these questions. Lawyers, when they venture into this area, discuss the effects of law in language and arguments which are based on unsupported empirical assumptions and their empirical observation lacks statistical rigor. There can be no doubt that impact studies have an important role to play in legal analysis and it is generally agreed that the law must

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19 Hirsh W.Z., Law and Economics - An Introductory Analysis, Academic Press, New York, 1977.

20 Becker G.S., Law and Economics - An Introductory Analysis, Academic Press, New York, 1977

ultimately be evaluated in terms of its success in achieving its goals, and not purely in terms of its formal legalistic structure.[21]

Normative Economic Analysis of Legal Issues

Normative or welfare economics is concerned with the goals of private and social allocative efficiency. The aim is to identify situations in which these are not achieved and to prescribe corrective solutions.[22] The analysis begins with the assumption that 'perfectly' competitive markets achieve private efficiency, that is an allocation of resources which is efficient from the point of view of the participants in the transactions. The relationship between the market and economic efficiency is often confused. The theory does not say that actual market is efficient. It only states that if a set of assumptions are satisfied, a market can operate

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21 Op.cit.

22 Bator F.M., "The Simple Analysis of Welfare" American Economic Review, 47, No.1, 1957, pp.22-59.

efficiently.

"Perfect competition is an economic model possessing the following characteristics; each economic agent acts as if prices are given, that is each acts as a price taker, the product is homogeneous; there is free mobility of all resources including entry and exit of business firms, and all economic agents in the market possess complete and perfect knowledge."[23]

It is on the basis of these assumption that economists' theorems concerning the private efficiency of the market and freedom of contract are based.

"A privately efficient allocation of resources will imply an allocation that is efficient from the point of society as a whole, i.e., that will be socially efficient, only if all of the consequences of reallocation of resources between uses are taken into account by the participants in the

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[23] Fergusan .C.E amd Gould J.P., Microeconomic theory, 4th edn., Homeward, III: Irwin, 1975, p.225

transactions. In other words privately efficient allocations will be socially efficient as long as there are no external costs or benefits of a transaction. An external cost is an uncompensated loss that is imposed on individuals by some harmful activity. In the absence of external costs a perfectly competitive market system is socially efficient because it places every productive resource in that position in the productive system where it can make the greatest possible contribution to the total social dividend measured in price terms, and tends to reward every participant in production by giving it the increase in the social dividend which its co-operation makes possible".[24] That is, society's resources are allocated to their highest competitively valued uses, and are sold at prices that reflect their marginal cost to society.

The prescriptive ability of welfare economics is based on the concept of market failure.[25] When the assumptions

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24 Knight F.H., "The Ethics of Competition", in the Ethics of competition and Other Essays, London: Alen & Unwin, 1935, pp.48p.48

25 Simons H.A., "On How to Decide on Which to do", Bell Journal of Economics, 9, No.2, 1978, pp.494-507.

underlying the perfectly competitive market are not met, the market will either operate inefficiently or fail to exist. This departure from the ideal outcome of the perfectly competitive market is referred to as market failure and it provides the social efficiency rational for legal intervention. Although market failure may result from many imperfections viz. monopoly, imperfect information etc., the most important one for legal analysis is external cost. The most significant examples of external cost relate to pollution, crime and road accidents.

The existence of harmful activities is not necessarily sufficient for market failure to occur. In a paper, Ronald Coase in 1960 demonstrated that perfectly competitive markets could in principle control harmful activities efficiently. It is considered as one of the central ideas in the economic analysis of law.[26] In the case

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[26] Coase R.H., "The Problem of Social Cost", Journal of Law and Economics,3,1960.

of pollution, in a perfect market the loss that pollution imposes on individuals would provide them with an incentive to bargain for a reduction in its level if they had no legal rights to compensation by the polluter. If the payment offered by the victims exceeded the costs to the polluter or reducing the level of pollution then the polluter would accept the victims' payment and decrease the pollution, because this could increase his profits. Voluntary bargaining of this type would continue until all the mutual gains were exhausted, which would occur at the socially efficient level of pollution.[27] If the law required the firm to compensate the victims for the harm it imposed on them, the firm would continue to pollute upto the point at which the profit from an increment of pollution is exceeded by the increased compensation payment. when all of the profit from an increment in pollution has to be paid to victims as compensation the firm would cease to increase the level of pollution and at the point he would be inflicting the socially

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[27] Barrows. P., The Economic Theory of Pollution Control, MIT Press,Cambridge

efficient level of harm. This analysis is known as the Coase Theorem. It implies that the choice of property rights would not affect the social efficiency of the final outcome. But this analysis relies on a set of highly restrictive assumptions which includes the assumption that the cost of the transactions or cost of bargains is zero. In general, transaction costs include the costs of identifying the parties with whom one has to bargain, the costs of getting together with them, the costs of the bargaining process itself, and the costs of enforcing any bargain reached. Even in the context of zero transactions cost the choice of property rights would be expected to alter the distribution of income and this in turn would determine the particular socially efficient resource allocation that the bargaining process would bring about.[28]

The Coase Theorem has had a significant influence on the economic approach to law. Its popularity has been due to

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[28] Mishan M.J., "Pareto Optimality and the Law", Oxford Economic Papers 19, No. 3, 1967, pp.247-287.

the fact that by describing an idealized market situation it focuses attention on the obstacles to socially efficient markets, the causes of market failure. These causes tend to be grouped under one issue, transaction costs, but they include a variety of frictions that impede the exchange of the kind envisaged by the model of the perfectly competitive market. These frictions include the costs of obtaining information, and of searching, negotiating and enforcing agreements.

When transactions costs exist the law is unlikely to be allocatively neutral, it has an efficiency role to play. This is true whether the law in effect provides a legal right basis for the market or bargaining process to operate upon to determine the level of external costs, or whether the law directly determines the level of external costs by establishing legal rights where the market is not operative with respect to such costs.

In principle, Coase Theorem can be interpreted merely as the statement that socially efficient levels of external costs depend, in the case of pollution for example, on the balance of the costs of polluting and the costs of not

polluting. This says nothing about the operability of markets. Coase originally presented the theorem in the context of bargaining over external costs. But many economists and lawyers have since explored the implications of the theorem on the context of the analysis of market solutions.[29] Much of his literature has been neoclassical in style and pro-market in conviction and has tended to favour common law and damages measures designed to give the ever-willing market a gentle nudge in the direction of social efficiency. More recently there has developed a considerable degree of scepticism concerning both the suitability of the neoclassical model of the behavior of firms for the analysis of many problems in law and economics and the relevance of the free market to the control of external costs in the real world of poor information and uncertainty. This scepticism has led first to the presentation of analysis which is referred as neo-institutional, that focus primarily on the organisation of transactions when transaction costs are significant, and secondly to the investigation of statutory methods of control

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29 Posner R.A., Economic Analysis of Law, 2nd Edc. Boston L., Ali Brown, 1977.

intended to deal with market failure or to achieve other social objectives.[30]

The normative approach to the economics of law can be illustrated by looking first at the work of Calabresi, on accident law, and then at a recent attempt to use the notion of efficiency to provide a theory of legal rights and duties.

The efficiency approach to law usually proceeds by stating the objective of the minimization of the total social costs of an activity. According to Calabresi "the principal function of accident law is to reduce the sum of the cost of accidents and cost of avoiding accidents."[31] This goal presupposes three things that all losses can be expressed in monetary terms, that accidents can be reduced by devoting more resources to accident prevention and that those involved in or

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30 Willian A., "Collaboration Between Economists and Lawyers in Policty Analysis", Journal of Society of Public Teachers of Law, 13, NO.3, 1975, pp.212-218

31 Calabresi, The Cost of Accidents, a Legal and Economic Analysis, New Have, Yale University Press, 1970, pp.24.

potentially involved in accidents are sensitive to cost pressures[32].

Although many people would accept the proposition that accidents can be reduced by committing more resources to preventive measures, there is lively controversy over whether the type of cost pressures which are generated by damages awards will be effective in encouraging greater care[33].

The development of normative economic approach to tort is also interesting for the more general trend it reflects. Economics has been used in two distinct areas that correspond to the two dominant function of tort, namely, compensation and deterrence. The 'older' economic approach examined in great detail the operation of the tort system as an imperfect compensation scheme[34]. This literature is

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32 Needleman L., Valuing Other People's Lives, Manchester School 44, No.4, 197, pp.309-342.

33 Chelius R.S., "Liability for Industrial Accdients A Comparison of Negligence and Strict Liability System", Journal Legal Studies, 5, No.2, 1976, pp.293-309.

34 Conard A.F., Voltz, C.E and Bombaugh .R.L., Automobile Accident Costs and Payments - Studies in the Economics of Injurty Reparation, Ann Arborn University of Michigan Press, 1964.964.

generally marred by its tendency to identify economics with purely financial considerations and to assess the efficiency of accident law solely in terms of minimising the administrative costs of providing compensation. The 'new' economic approach, on the other hand, ignores the compensation goal and assumes that the aim of tort is to promote the efficient allocation of resources to accident prevention.

The models of economists frequently assume that the legal system is costless, that individuals are aware of the law, and that the court is capable of dividing all of the information required to make the efficiency calculation. In spite of these limitations, the literature has made an important contribution to theoretical analysis by showing that legal standards embodying cost-benefit type comparisons have a clear economic rationale. However, it conveys a false impression that efficient doctrine in an abstract world necessarily means efficient law in some empirically relevant context[35].

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[35] Posner R.R., Economic Analysis of Law, 2nd edn. Boston: Little-Brown, Ch. 6, 1977.

An unfortunate feature of the economic approach to legal issues has been the tendency of many studies to ignore the relationship between social efficiency and the distribution of income and wealth[36]. If a perfectly competitive market is to operate efficiently, in addition to the assumptions, we need a clearly defined initial distribution of income and wealth which is legally protected by a set of property rights. The features of socially efficient market outcome to a great extent depend on the initial distribution of income, because of each different distribution of income there is a different socially efficient outcome. The desirability of social efficiency as a goal requires a value judgment as to the justness of the underlying distribution of income and property rights[37]. It is worth substantiating this idea because of the confusion that has recently arisen in the literature. It has been asserted that

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36 V. Graaj, J., Theoretical Welfare Economics, Cambridge University Press, 1957.

37 Hahn F and Hullis, M., (eds.), Philosophy and Economic Theory, Oxford University Press, 1979.

legal rights should be assigned to those who value them most highly. This dictum is seen as establishing efficiency as a 'comprehensive and unitary theory of rights and duties'[38]. But this claim fails for a number of reasons. First, the valuation of rights in terms of money is itself determined by the bundle of rights the individual already possesses which in turn determines the individual's wealth. Secondly the contention that corrective rights should mimic perfect market outcomes begs the question. If rights are to be assigned to mimic perfect market outcomes we must know what structure of rights that outcome was based on. An efficiency theory of legal rights is admitted by its advocates to be a very limited theory: it is a theory that the law seeks to optimize the use and exchange of whatever rights people start out with.[39]

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38 Posner R.A., "Some Uses and Abuses of Economics in Law", University of chicago Law Review, 46, No.2, pp.281-306.

39 Posner R.A., "Utilitarian Economics and Legal Theory", Journal of Legal Studies, 8, No.1 1979, p.108.

Economic Analysis of Law

There are advantages and disadvantages of the economic approach to legal issues.

The major source of disagreement between economist and academic lawyer over the economic analysis of law relates to the nature and value of model building. Lawyers and economists approach problems in different ways[40].

The lawyer is concerned with the particular, with factual details and with formal legal propositions supported by argument. The economist, on the other hand, is concerned with generalities, prefers to sweep away details and his analysis tends either to be partial or to stress the numerous considerations which apply to a particular problem. The economic approach seeks to connect ends to means, to provide generalizations that can be used to frame policy and to evaluate legal doctrine and procedure, to reveal the

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[40] Auber .V., "Researches in the Sociology of Law", in Law and the Social System (M. Barken, ed.), 1973.

trade-offs between goals and to trace through the interrelationships between different laws and private behaviour[41].

Frame work or model building has two short-comings. The first is that models can be mistaken for the total view of phenomena, like legal relationship which are too complex to be painted in any one picture. The second is that models generate categories in which one may be forced to accept situations which do not truly fit. However, there are compensating advantages for models. The economic approach places at the forefront of discussion the need to choose and the costs and benefits of alternative choices, which must always be a relevant consideration where resources are limited. Lawyers may not always consider the different type of costs involved in legal activities. Economics tells us that nothing is free from society's viewpoint. The decision to litigate for example, consumes economic resources that will then be unavailable for other uses and the economic approach

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41 Lowry T.S., "Review of Posners's Economic Analysis of Law", Journal of Economic Issues, 6, No. p.11-114.

can assist in determining the real value of money. As Leff has put it, "the central tenet and most important operative principle of economic analysis is to ask of every move (1) how much will it cost; (2) who pays: and (3) who ought to decide both questions".[42]

A common criticism is that the utility maximization hypothesis is tautological and therefore it should not be considered that its apparent 'explanatory' power is great. In a purely formal sense this criticism is not correct. The utility maximisation hypothesis is based on a set of axioms. In its predictive use this hypothesis is capable of falsification if the predictions derived from it do not confirm to experience.

The rationality assumption has been responsible for revealing some important consequences of legal change. People do not respond passively to the law, nor mindlessly obey it, but they adapt to the changed costs and benefits that it

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42 Leff. A. A, Economic Analysis of Law : Some Realism about Nominalism, Virginia Law Review60, No.4 p.46.

brings about. This may be in the desired direction, but it may also lead to perverse effects that subvert the objectives of law[43]. The economic approach not only provides an integrated treatment of effect of legislation but has also been responsible for drawing attention to the more subtle and hitherto unrecognized economic effects.

Another attractive feature of economics is the sophisticated level of its statistical analysis and its ability to quantify the impact of law. Although all legal questions are not susceptible to statistical analysis, certain legal impact, for example, economic impact of private property litigation, can be statistically analysed. The lawyer's approach to empirical analysis is mostly confined to the examination of trends in legal activities.

Against these attractive features of the economic approach, there are some deficiencies in this approach.

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[43] Petlzman .S., The Effects of Automobiles Safety Regulation, Journal of Political Economy, 83, No.4, 1976, pp.677-725.

The first is the concentration on efficiency. This conveys the misleading impression that the sole contribution of economics is to analyse the law in terms of efficiency where as economics has elsewhere been applied fruitfully to the discussion of justice, distributional and political question[44].

If there is a conflict between efficiency and justice, the nature of the difference can be illuminated by economic analysis. Since the attainment of justice involves the use of economic resources the economic approach can contribute to normative discussions by providing information on the cost of justice[45].

The alternative view has been stated by several prominent exponents of the economic approach to law, that efficiency and justice are synonymous "second meaning of

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44 Tideman. N.,Property as a Moral Concept, Perspective of Property, 1972, p.202-203 (G. Wunderlich and W.L. Gibson eds.). Pennsulvania State University.

45 Thuron, Economic Justice and the Economist 1973, p.120-129.

justice and the most common, argues Posner[46], is simply efficiency". While this conventionally removes the need to consider questions of justice, it does so by refusing to accept that there are widely held notions of justice and of just protection from interference that do not coincide with efficiency.

The efficiency approach focuses solely of outcomes and assumes that the process by which they are achieved are not valued by individuals[47]. The law is treated as a factor of production like a machine, which is efficient if it maximizes the economic value of goods and services. The suppression of processes and other intangible factors in economics is largely the result of the economist's urge to make things commensurable in terms of the common denominator of money. But at a conceptual level the efficiency calculus cannot sustain this distinction between means and ends if both are independent sources of utility. If legal processes or the way

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46 Posner R.A., Economic Analysis of Law, 2nd ed. Boston: Little -Brown, 1977.

47 Grudy .A., Law, Politics and Institutionsalist, Journal of Economic Economics Issues I , No.4, p. 623-643.

of doing a thing yield utility, then individual will be willing to pay for these (through the reduced efficiency of the outcome), and if they are not incorporated into the efficiency calculation it will be both incomplete and misleading[48]. It implies that for commenting on the efficiency of a law by merely doing a cost-benefit analysis of its impact on the economic value of goods and services alone is not sufficient, the value people place on the legal process must also be included[49].

Now we may turn to discuss the peculiar problems encountered with lawyers' use of economic analysis for the purpose of describing and explaining the law.

Positive Economic Theories of Law

Lawyers tend to use economic to provide descriptive and comprehensive theories of law. The economics of crime is

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[48] Tribe L.H., Policy Science: Analysis or Ideology, Philosophy and Public Affairs, 2, No.1, 1973, p.88.

[49] Liethafsky H.H., The Problem of Scial Cost: An Alternative Approach, Natural Resources Journal, 13, No.4, 1973, p.623.

mainly predictive in nature. But when the economic theory of crime is used to explain the structure of the criminal law it performs poorly[50].

In contrast to the experience with criminal Law, economics has had a considerable impact on legal scholarship on tort and contract. The major reasons for this are that the bulk of literature in the positive economics of law does address questions that are central to legal scholarship, and that it uses economics not to predict the impact of law, but to describe and explain the law for providing it with an economic rationale[51]. According to Friedmans[52] "predictive economic theory has no substantive content".

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50 R.A. Posner, Economic Analysis of Law, 2nd ed. Boston: Little-Brown, 1977, Ch.7.

51 Ibid, p. 18.

52 Friedman, M. The methodology of Positive Economics, in Essays in Positive Economics ,University of Chicago Press, 1953, p.26..26.

The descriptive use of economics must be judged by a different criterion, for two reasons. First, since its purpose is to describe the existing system of law, rather than to predict the impact of changes in the law, it must be given substantive content[53]. Secondly, the aim should not be to discover the nature of a hypothetical legal structure that would satisfy the requirements of efficiency and use it as a standard by which to judge real law, but to see to what extent the existing law is constant with the notion efficiency[54].

The efficiency theory of the common law, which was first advanced by Posner in a paper entitled "A Theory of Negligence", centres on the hypothesis that the implicit goal of the common law is to promote an efficient allocation of resources. In a largely descriptive analysis Posner attributes to the doctrines, remedies and procedures of the common law economic interpretations that suggest that the efficiency content of the law is high. In the area of tort,

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53 Posner R.A., Theories of Economic Regulation, Bell. Journal of Economics and Managerial Science, 5, No.4

54 Ibid., 1974, p.757-782.

more specifically in the area of negligence, the determination of damages as a remedy and the calculation of damages etc. are based on economic logic[55].

An Alternative Economic Approach

An approach of the institutional economics of John Commons[56] was based on market process. This revitalization follows Commons by making not the individual but the transaction the basic unit of analysis. For Commons the transaction represented the 'unit of activity' that possessed the three essential principles of conflict, mutuality and order that he saw as necessary to correlate law and economics. The transactional approach, alternately called nec-institutional, relational or transaction cost approach, is still in its formative stages. However, the work of

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[55] Posner R.A., A Theory of Negligence, Journal of Legal Studies, 1, No.1, 28-96, 1972.

[56] Commons J.R., The Problem of Correlating Law, Economics and Ethics, 1932, Wiconsin Law Review, 8, No.1, 1932, pp.13 and 6.

Williamson[57], Goldberg,[58] the related legal discussions of Macneil[59] on contract, Calabresi[60] on tort and Austrian economic critiques like Little Child[61] and Rizzo[62] all provide a complementary framework that deals apparently with the difficulties of the neoclassical market approach. Unlike the market based approach the neo-institutional approach does not assert that the law or institutions are efficient, but as usually only attempts to identify the efficiency attributes of various institutional arrangements, and to hypothesize that there is a tendency for institutions to evolve to exploit opportunities for improving the efficiency with which market

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57 Williamson O.E., Transaction Cost Economics: the Goverance of Contractual Relations, Journal of Law and Economics, 22, No.2, 1979, p.233-261.261.

58 Goldberg V.P., Regulation and Administered Contracts, Bell Journal of Economics, 7, No.2, 1976, p.426-448.

59 Macneil I.R., The Many Features of Contracts, Suther Califoria Law Review, 47, No.3, p.691-816.

60 Calabresi G., Some Thoughts on Risk Orientation and the Law of Torts, Yale Law Journal, 70, No.1961, p.499-553.

61 S.C. Little Child, The Problem of Social Cost, in New Directions in Austrian Economics (L.M. Spadaro ed.), Kansas Citty: Sheed Andrews and McMeel, 1978.978.

62 Rizzo M.J., The Economic of Negligence and Strict Liability in Torts, Journal of Legal Studies.

and non-market goals are followed.

It is due to the work of pro-market economists and lawyers that a large proportion of the economics of law literature has related to methods of fostering markets rather than finding alternatives to them when markets have failed. An example of this is the debate on liability rules and bargaining solutions to external cost problems, when most of the serious external costs relate to air and water pollution. These problems cann't be solved by market[63].

There has been developing an increasing interest in the scrutiny and evaluation of the operation and impact of statute laws in a number of areas, for example, pollution control, safety and work legislation, consumer protection, habitation law, planning and social security law[64]. In addition it has been recognized that the law in practice may differ significantly from the law on the statute books, so

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63 Ibid

64 Biller J.C. and Yandle B., (eds.), Benefit-Cost Analysis of Social Regulation, Washington D.C., American Enterprise Institute

that a greater emphasis has been placed on the performance of enforcement procedures[65].

The main trends in the economics of law shows that it can provide insights in places where traditional legal analysis fails to penetrate. It is the essentially complementary nature of the two disciplines that makes as optimistic that collaboration between lawyers and economists will be increasingly fruitful in the future[66].

The sound theoretical legal economic nexus highlights the relevance of the present study on Economics of Justice in Kerala with reference to the Private Property Litigations. The development in the literature on economics of law helps in properly evaluating the economic value of the private property litigations by using the model developed for the study.

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65 Rromman A.T., and R.A. Posner (eds.) The Economics of Contract Law, Boston; Little - Brown.

66 Coase R.H., Economics and Contiguous Disciplines, Journal of Legal Studies, 7, No.2, 1978, p. 201-211.

CHAPTER III

HISTORY OF CIVIL JUSTICE AND PROPERTY RIGHTS IN INDIA

The present chapter analyses the conceptual and procedural aspects of administration of civil justice in the private property litigation and has been divided into three parts. Part I deals with theoretical issues involved in the concept of justice. In order to explore the evolution of civil justice administration in India and to examine the administrative set up established for dispensation of civil justice, a detailed historical investigation of the legal and economic scenario of pre-independent India has been made in Part II. For making an economic evaluation of private immovable property litigations in Kerala, Part III of the present chapter lays out the legal - economic & philosophical issues involved in the concept of property.

PART I. Conceptual Issues in Justice

The term justice evokes various perceptions in respect of its concept and connotation. The meaning of the term is not undisputably settled, either theoretically or

pragmatically. It is a relative term varying in dimensions of time and place. However, "justice generally means a moral value commonly considered to be the end which law ought to try to attain, which should realize for the men whose conduct is governed by law, and which is the standard or measure or criterion of goodness in law and conduct, by which it can be criticised or evaluated.[1]"

Theories of justice are considered to determine what justice, is settling its status as an ethical standard and to settle practically which the requirements of this standard are. Discussions of issues of justice have been the concern of ethical, social and political philosophers, as well as jurists from the earliest times.[2]

"In the beginnings of recorded ethical and legal thought the term "justice" was used as equivalent to righteousness in general. Justice comprised the whole of

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[1] David M. Walker, The Oxford Compansion to Law, Calrendon Press, Oxford 1980, p.689.

[2] Ibid

virtue and complete conformity with the approved pattern of moral conduct. For purposes of rational analysis philosophers, following Aristotle, preferred to restrict the term's reference to a particular virtue, distinguishing, for example between justice and equity or between justice and charity.[3]

"Procedural justice consists in employing correct methods to develop rules of conduct, to ascertain in the facts of a particular case, or to devise a total appreciation absorbing rules and facts into final dispositive judgment. Among the classical philosophers, only Aristotle and Thomas Aquinas showed sufficient awareness of the functional relations between standards and rules, evidence and facts, and facts and judgements to enquire with care into the principles of procedural justice. Their respective contributions were derived from two main sources: (a) the empirical wisdom of the times and (b) the practice and nomenclature of the law courts.

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[3] International Encyclopedia of the Social Sciences, Vol. VII & VIII, Edn. 1972, p. 341-347, The Macmillan Company, New York

Each of these sources reached a turning point in the eighteenth century. Empiricism then began its evolution into modern utilitarianism and pragmatism, while court practices began slowly to adapt themselves to modern ideals of human dignity and political democracy. Moreover, as former provinces of philosophy gradually became specialised into the new sciences of economics, psychology, sociology and anthropology, these offered new guides of varying degrees of dependability, for the progress of procedural justice. As for fact finding, the evolving methods of the law courts still presented an indispensable paradigm of judgement. Since the eighteenth century, despite innumerable errors and injustices in the law courts, judicial procedure has undergone noteworthy reforms and advances.[4]

Justice is the basis of a society which aims at peace and progress. It is agreed by most jurists that law is an instrument of society to establish justice. Broadly civil law is either substantive or procedural. Substantive law is

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[4] International Encyclopedia of Social Sciences, Vol. VII & VIII - Reprint Edn. 1972, p. 341-347. The Macmillan Company, New York.

that which defines the rights of the citizens while procedural law lays down remedies for the breach of these rights. Substantive justice is that which is concerned with how best to allocate, distribute and protect the substantive values of society. These values include power, wealth, status, order peace and whatever other goods and services a society cherishes. Procedural justice is concerned with how the law is administered. In other words, what mechanism or process are used in applying the law and making decisions in specific cases. The law of procedure may be defined as that branch of the law which governs the process of litigation.

Generally, the term justice has two meanings. In the wider sense, justice is synonymous with morality, but in the narrower sense, it refers to only one aspect of morality. In this sense justice means fair and equal treatment to all. Justice, in this sense of equality, has two aspects. viz. distributive justice and corrective justice. Distributive justice works to ensure a fair division of social benefits and burdens. The task of establishing distributive justice is primarily achieved through constitution-making and by legislation. The function of the courts is chiefly to apply

rules for the purpose of establishing corrective justice. Distributive justice works to ensure a fair division of social benefits and burdens amongst the members of a society, as for instance, that every person has a right to the property legally acquired by him. Distributive justice thus serves to secure a balance or equilibrium amongst the members of a society. This balance can be upset for example when 'A' wrongfully seizes B's property. At this point, corrective justice will move into correcting the disequilibrium by compelling 'A' to make restitution to 'B'.

Modern Courts of Justice are Courts of Law. It means that modern justice is administered in accordance with the rules of law. In a modern state, the administration of justice according to law is commonly taken to imply the recognition of fixed rules. The purpose of civil law is to ensure the assertion or enforcement of civil rights and civil remedy i.e., damages obtainable in a court of civil jurisdiction.

In Law, the term 'procedure' means the manner and form for enforcing an enactment. It significes a prescribed

course of action for enforcing a legal right and hence it necessarily embraces the requisite steps by which a judicial action is invoked. On its general acceptance the term "proceedings means the form in which the action is brought or defended, the manner of interaction of parties, the mode of deciding issues of opposing judgement and of executing. The expression civil proceedings used in Article 133 (1) of the Constitution of India is wide enough to cover any proceeding of a civil nature decided by the High court whether in its original, appellate or revisional jurisdiction. Further, if the proceeding involves the assertion or enforcement of a civil right, it is a civil proceeding. It also includes civil remedy i.e., damages obtainable in a court of civil jurisdiction apart from the liability of the offender or trespasser to be punished under the criminal law.

PART II. EVOLUTION OF CIVIL JUSTICE SYSTEM IN INDIA

The administration of civil justice in India is mainly modelled on the English legal system. A study on the economic rationale of private immovable property litigations call for an enquiry into the evolution of the administration

of civil justice in India.

The ancient Indian law covers not only legal codes but also prescribed codes of ethics and religious practice. The Vedas are considered as the earliest sources of law and justice. The first is Rigveda which is the most important, reveals a great deal about the language, way of life, code of conduct and mode of worship of early Aryan settlers in India. The second, Samaveda is a collection of rigvedic hymns relating to Somayaga. The third, Yajurveda is the collection of Mandras for the purpose of different sacrifices and rituals. The last collection is Atharvaveda, it contains magic spell and incantations in verse.

The Rigvedic literature tells us not only the religion in which the Indo-Aryans lived but also about their social, political and economic conditions. The later Vedas are believed to have been written between 1000 B.C and 800 B,C.

The major later vedic literature includes the Brahmanas, Aranyakas, the Upanishads, the Upavedas, Vedangas

and Dharmasutras. Dharmasturas are very important because they are the first legal works. In the Dharmasutras the rise of administrative law, judicial procedure, rule of inheritance etc. are found.

The two epics, the Mahabharata and the Ramayana contain some basis of law. Many passages from these epics are quoted in law books. The Arthasastra of Kautilya is the first systematic work available on the science of polity. It is a comprehensive treatise on legal, economic, and administrative matters.

The Smrithies are the works that guide people towards right path. They lay down religious duties and, law and custom. Manusmrthi is the oldest among smrthies and is considered to be the most authoritative work on law. The other major smrthies are yajnavalkya smrthi, the Parasarasmrthi, the Naradasmrithi, the Brahaspatismrthi and the Katyayanasmrthi.

The history of civil justice in India can be analysed on the basis of following aspects.

1. The courts existed during different times.
2. The laws followed by the courts.
3. The law-making bodies.
4. The jurists interpreting the laws.

During the pre-colonial period village government was in vogue in India. The development of panchayats varied in various places. A complete network of village authorities existed in ancient India. The judicial functions were sometimes performed by special village courts. The village courts were usually elected by the villagers, though in some cases there was indirect election and nomination. The administrative tasks entrusted to panchayats were to a great extent successful. However, after the establishment of English rule in India, there was a thorough transformation in the ancient self-government through panchayats.[5]

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[5] Chakradhar Jha: History and Sources of Law in Ancient India, Ist Edn. 1981. Ashish Publishing House, New Delhi.

Informal and Ready Justice from 1600 to 1726

Soon after their arrival the English realised the need and strategic relevance of organising a working judicial system in the areas under their supervision. Without much delay some sort of dispute-deciding machinery was set up in the Presidency towns of Bombay, Madras and Calcutta.

The East India Company as a trading concern was not bestowed with any judicial powers other than those required for maintaining discipline over its men. As an alien body it could hardly possess any judicial authority over the local population. The company found it difficult to carry on its business properly without permission to settle disputes amongest its own members and people around it. Upon request from the company in 1661, the British Crown authorised the Governor and Council in each factory to judge all persons, whether belonging to the company or living under them, in both civil and criminal matters through the Charter of Charles II.

In pursuance of the 1661 Charter each presidency town formulated separate and independent judicial schemes

depending upon the genius and imagination of the local Governor and Council. But the Governor and council felt the need of trained legal expertise and positive judicial authority to manage the task of handing down decisions. Upon request, the Crown authorised the company in 1683 to establish an Admiralty Court in all proper places to try cases. The composition of the court consisted of a person learned in civil law and two merchants appointed by the company. Admirally court when established in Madras functioned well for some period. The situation changed soon as the Company Directors at home were not interested to appoint a legal expert to preside over the court. It reduced the Admirably Court to the minimum in its independence and the judicial power thus again got concentrated in the executive, i.e., the Governor and council. During this period, that is, up to 1726, Madras saw the continuation of the indigenous judicial system and few innovations there in. Bombay went through successive judicial plans, But none too effective.

In Calcutta, besides the court of the Governor and council, there was the collector's court with one of the councilors appointed as the collector. He dispensed justice

in all matters civil, criminal and revenue pertaining to the Indians residing in the settlement. The collector's court existed by virtue of the company being a Zamindar. The other Zamindars sent their appeals to the Mughal courts. It was an illegal deviation from the settled practice for the collector to look up to the Governor and Council for final orders instead of seeking the approval of the Indian authority.

The period is marked for its unmethodical and raw administration of justice. It neither had any systematic pattern of courts nor any well-defined and definite law or procedure. Whatever existed in the name of courts imparted justice in a rough and ready manner according to the importance of the litigants and nationality of the party.

Authoritative and Uniform Judicial Pattern From 1726 to 1773

After a century since its inception, dimensions and needs of the company changed considerably. Its flourishing trade increased business transactions and added to the population in each settlement. The disorganised and informal mode of administering justice was no more suitable. On

petition presented by the Company, George I granted the charter of 1726. It supported to meet the want of a proper and competent authority for the more speedy, effectual and appropriate administration of justice. There upon the existing courts were superseded and established a Mayor's Court in each of the three settlements viz. Madras, Bombay and Calcutta. Its composition was to be mayor and nine aldermen, seven of whom including the Mayor were required to be natural born British subjects. They were removable on proof of sufficient causes by the governor and Council. The court could hear and decide all civil cases arising within the Presidency and in its subordinate factories. First appeals from it lay to the governor and council and second appeal to the King-in-Council. To safeguard the interests of the heirs of Englishmen dying without will in India, the court was empowered with testamentary jurisdiction also. The court was to administer justice according to 'justice and right'. 'Justice and right' in the then existing context was taken to mean English law.

The Charter of 1726 is referred to as the first judicial charter in the sense that in spite of its inherent

limitations it initiated uniformity and authenticity in the judicial administration. The Privy council remained the last court of appeal for India and it remained for more than two hundred years. The effective contribution of the Privy council in developing Indian Law and establishing sound precedent for Indian judiciary is unparalleled.

But the plan of 1726 did not prove to be of any immediate success. In the prevailing circumstances, Persons operating the court were connected with the company, and in one way or the other, under the influence of the governor and council. The latter also had the power to order their removal. further, the Charter made no provision for the natives. Justice administered by the Mayor's Court was in accordance with the English law, contrary to the legal and social tradition of the natives, causing them immense hardship and dissatisfaction. It resulted in resentment against the court. In no mood to enter into local troubles, the Crown formally exempted them in 1753 from the court's jurisdiction unless both the parties agreed to come to it. But the non availability of any other court in the presidency areas made the exemption meaningless. With the weakening of the Nawab's

authority, they declared themselves immune from local tribunal also.

Justice in the Interior or Mofussil

With the passage of time political ambitions of the Company gained momentum and large areas beyond the limits of the presidency towns were brought under its control. These, referred to as the 'mofussil', were distinct from the 'presidency areas' for purposes of administration. The 'mofussil' was completely under the Company's jurisdiction with no relation with the crown. Judicial organisation provided by the company in the 'mofussil' was called the Adalat System. The Company held the reins of the entire administration of Bengal, Bihar and Orissa, including collection of revenue and the administration of civil and criminal justice. The civil administration of justice was, by and large, left under the immediate management of the two native Diwasns, the company considering it not prudent to entrust it immediately to Europeans unfamiliar with the local law and society. An exception was made in the case of districts close to Calcutta where English servants were

appointed for the task.

Separation of Judicial and Executive Powers From 1773 on wards

In the absence of any steady and appropriate judicial order, the Company rule in Bengal became a terror. English public opinion was roused, the British government decided to interfere. It was specially concerned about the administration of justice. The Parliament passed the Regulating Act in 1773 to regulate matters in Bengal.

Besides other provisions, it provided for the establishment of a Supreme Court replacing the Mayor's Court. The attempt was to separate the judiciary entirely from the executive limit and to place it under the direct authority of the King instead of the Company. The court was to consist of a Chief Justice and two or three puisne judges who were to be trained English Lawyers, directly appointed by the Crown. Appeals from it, both in civil and criminal matters, lay to the Privy council. It was a decided improvement upon the Mayor's Court. However, certain ambiguities in the charter created difficulties. The executive disliked the court's

interference in its administrative actions. The company personal could not tolerate the court's sanction and scrutiny over their diwani pursuits which they thought to be a relationship exclusively between them and Moghul authority. Indians were not pleased by the court's alien laws and procedure.

The Regulating Act was well-intentioned but ill-planned and rashly and ignorantly executed. The problems related to Regulating Act raged for seven years till parliament intervened by passing the amending Act of 1781. The most noteworthy provision in the 1781 Act was to allow an appeal to His Majesty from the Sadar Diwani Adalat, the highest civil court on the adalat side.

Improvement in the Adalat System

The adalat system of the company started with haphazard attempts to solve disputes, gradually assumed method and appropriate judicial character.

To restore order in Bengal, Hastings started

organising courts in the mofussil. A few small cases courts were also set up for quick disposal of petty cases. Cornwallis arriving on the scene resented the policy of over concentration of authority in the collector. By the eve of the eighteenth century the collector was stripped of all judicial powers and was confined to revenue collection and administrative duties. The higher judiciary was completely separated from the executive. This tempo, however did not last long. Excessive pressure of work on judicial bodies added with practical considerations of strengthening the hands of the executive officers, resulted in reinvesting the executive with judicial powers.

By the mid-nineteenth century a regular hierarchy of courts, separation of the judiciary from the executive at least in civil matters, classification of civil, revenue and criminal jurisdiction, and sound procedural practice were evolved. Initially natives were only associated as legal advisers for expounding native law. In course of time they were appointed judges at the lower ranks of the adapt ladder. Munsiff or amin for civil, and collector magistrate for the revenue and criminal matters, stood at the base, then came the

district courts, and finally the Sadar Diwani and the Sadar Nizamat respectively for civil and criminal work. The Sadar Adalats were primarily appellate bodies.

End of the Judicial duality

Queen Victoria's declaration making India British dependency in 1858 meant absolute control and responsibility of England for administering India. The amalgamation of the Crown courts with the Company courts materialised in 1861 by the passing of the Indian High courts Act. In course of time a High court was established practically in each province. The creation of High courts was a momentous progressive step in developing a unified system of law and administration of justice in the country.

Progressive legislation gradually established in course of time. The High courts in each province acted as the highest court of appeal. Appeals from them went to the Privy Council.

Creation of a Federal Court

Under the Government of India Act 1935, the attempt to initiate a federal polity in India necessitated the creation of a federal court. To interpret provisions of the Act objectively and determine disputed issues arising between the federation and the units or the units interse, a Federal Court was established in 1937. As an appellate body it could hear appeals from the High Courts on a certificate that the issue involved a substantial question of law as to the interpretation of the 1935 Act. In its advisory jurisdiction it could render advice to the Governor General on any legal matter of public importance. The Federal Court actually left the domain and authority of the High courts untouched. Barring a limited sphere, appeals from the High Courts also continued to go to the Privy Council as before. Decisions of the Federal Court also appealable in the Privy Council.

Independence and the Establishment of the Supreme Court of India

Since India became a Republic after independence the Supreme court of India has been established as the highest

court in the country. It has replaced the combined jurisdiction and authority of its predecessors, the Federal court and the Privy Council. The last link with the Privy council was served in 1949 in anticipation of India attaining the status of a full republic in 1950. The Supreme court has a wide appellate jurisdiction in constitutional, civil, criminal and other matters. In the normal course a decision of the High Court is only appealable when the High Court certifies that the cases satisfy the conditions prescribed for appeal in the Constitution. But the court enjoys further overriding discretion to grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter made by any court or tribunal in the country. It strengthens the authority and ability of the highest court in the country to rectify all deviations from norms of sound administration of justice. On the original side it repeats the role of the Federal court to decide disputes between the centre and the states or amongst the states. Its original jurisdiction also further encompasses the important sphere of fundamental rights as enshrined in the constitution. The constitution has ensured the independence of the Supreme Court in many ways. Law declared by the Supreme court is

constitutionally binding on all the courts in India.

The Lower Judicial Structure

The remaining judicial structure is materially the same as left by the British. It is a correlated hierarchy resulting in a pyramid with the supreme Court at the apex. The immediate successive rung is of the High Courts, one for each state. This is the highest state forum of appeal and revision for both civil and criminal matters, it is also invested with writ jurisdiction.

For the administration of civil justice each state is divided into several districts. Every districts has a Districts Court as the principal civil court of original jurisdiction. It is a court of appeal and has powers of supervision over the courts below. Under it there are arranged a number of lower courts whose details vary from state to state.

The Present shape of Indian legal system is unrecognisably distinct from its early phase. A superficial

glance is sufficient to show its close resemblance to the English legal system.[6]

Nature of the Indian Legal System

"A study of the different branches of the Indian law may show glimpses of the Indian legal system as a whole. Changes in the laws may result from legislation and judicial decisions. But the concepts and methods of the system are its constant elements. In the material content of laws there is much overlapping among the laws of different countries. But in terms of the constant elements or the fundamental ideas animating the legal systems the major legal systems of the world may be classified as (1) the common law, (2) the civil law (3) the socialist legality and (4) religious systems of law. While the Indian legal system is basically a common law system, it contains elements of the other three systems as well. It is an open system taking in what is most suitable to

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[6] Raj Kumari Agarvala, "History of Courts and Legislatures", Indian Legal System ed. by Joseph Minattur, Indian Law Institute, Publication, New Delhi 1st Ed. 1979.

our needs".[7]

British rule in India introduced the common law into this country. This provided the basis of our present legal system. Unfortunately, much British-Indian legislation denied the enjoyment of civil and political rights to the Indian citizens. The letter of the law, therefore, went against the spirit of the law. Therefore, from the earlier American example, the Constitution of India was made the supreme law of the land in 1950. The constitution of India was apparently intended to entrench the more permanent values cherished by the society.

Originally the rule of law merely protected the individual from the arbitrary actions of the state including the legislature. Later, the weaker sections of the society who were exploited by those who wielded power had to be protected by the state itself against private economic power. Inequality in the society had to be removed with a view to

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7 V.S. Deshpande, Nature of the Indian Legal system, Joseph Minature (Ed.) 1st Edn., 1979, Indian Law Institute, New Delhi.

establish an egalitarian order. The role of the state instead of being merely negative (abstaining from interfering with the liberties of people) became positive (to protect the weak against the strong, the exploited against the exploiter and the poor against the rich). In India in order to bring about equality and social welfare, the directive principles of state policy set out in Part -IV of the Constitution should be properly implemented.

The British tradition introduced in India was that the function of the judges was to interpret and apply the law and not to make the law. Whenever the statute law is absent, the judges, according to many state statutes, are to be guided in deciding cases by the principle of "justice, equity and good conscience".

In addition to the Constitution of India there are other types of laws too. The Parliament as well as the state legislatures can formulate laws for various purposes. In the absence of legislature the President of India and the Governors of different states have the right to promulgate ordinances for temporary laws. The central laws are

applicable to the whole nation but the state laws have relevance to the respective states only. The specific areas of union and state legislation are included in the 7th schedule of the Constitution of India. Including the Union and State laws altogether there are 1500 laws relevant in Kerala. These laws are not always against the articles enshrined in the Constitution of India. The laws which are against the constitutional articles are regarded by the Supreme Court as against the Constitution.

In our country different kinds of laws are prevalent, the laws relating to the life and property of individuals, reputation, and the provisions to protect them are generally important. The laws relating to lands, buildings, commerce, film, land tax, income tax, sales tax, motor vehicles etc. are the specific laws which are entrusted to the specific agencies. In addition to the centre and the state, Corporation, Municipality, Panchayat and the autonomous bodies like Universities etc. are having separate laws in the state. Apart from civil and criminal courts, there are certain tribunals in Kerala for dealing with some special laws. University statues, Co-operative Acts, Forest Laws,

Sales Tax Acts etc. are examples. These tribunals are established in Kerala for reducing the administrative burden of the general courts and to ensure efficiency in the administration of justice.

Constitutional Provisions of Justice in India

The concept of socio-economic justice enshrined in the preamble of our constitution reflects the aspirations of the people of India. This preambulary message of socio-economic justice has been translated by the founding fathers into several provisions in parts III and IV of the constitution. The former contains the fundamental rights of the citizens and the latter deals with the directive principles of state policy. In fact, both these sets of provisions owe their origin to the freedom struggle waged by the people of India against the British regime. During the national struggle, the Indians not only demanded civil and political rights from the British but also pledged to create a new social order based on social and economic justice.

The constitution of India and its preamble uses the

expression that the sovereign democratic republic is to secure for all its citizens inter alia "Justice, social, economic and political:. This is one of the controlling aspirations of the Indian constitution. "On the concept of justice, there are three major contending ideologies competing in the field of legal thought. One is justice according to law as pronounced by the state through its accredited Government including the legislature, the executive and the judiciary. The second is justice not only according to law but also over-riding the law in case the administration of law leads to manifest injustice either according to principles of natural justice or according to unfettered human conscience of the person administering justice. The third is whether justice is always class justice or whether it is classless justice".[8]

The Constitution of India is based on sound principles of economic justice. The preamble of the Constitution points out the resolve of the people of India to

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[8] Justice P.B. Mukharji, three Elemental Problems of the Indian Constitution. Ist Edn. 1972 published for the Institute of Constitutional and Parliamentary Study, New Delhi.

create a socialistic pattern of society in the economic field. The aim of the government has been, in every field of economic activity particularly in the field of taxation, public expenditure, social welfare, land reform, community development, labour legislation, industrial policy, others, to secure justice, social and economic and to provide equality of status and of opportunity for all citizens. The fundamental rights of the Indian Constitution in articles 23 and 24 speak of the rights against exploitation. Traffic in human beings and objectionable forms of forced labour are prohibited by the Indian Constitution and any contravention of this provision shall be an offense punishable in accordance with law. Article 24 of the Indian Constitution prohibits employment of children below the age of 14 years to work in any factory or mine or engage in any other hazardous employment. Article 35 of the Indian Constitution authorises legislation to give effect to the provisions of fundamental rights of the Constitution including those of economic justice.

provides inter alia that men and women equally have the right to an adequate means of livelihood, that the ownership and control of the material resources of the community are so distributed that operation of the economic system does not result in the concentration of wealth and means of production to the common determined, that there is equal pay for equal work for both men and women, that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength and that childhood and youth are protected against exploitation and against moral and material abandonment. The other aspirations of economic justice in the Directive principles of state policy under the Indian Constitution provide for right to work, to education and to public assistance in certain cases and the state shall, within the limits of its economic capacity and development, make effective provision for securing such right to work, to education and to public assistance in cases of employment, old age, sickness and disablement, and in other cases of undeserved want under Article 41 of the Constitution. Article 42 of the Indian Constitution declares that the state shall make the provision

for just and human conditions of work and for material relief. This is followed by another provision under Article 43 of the Constitution which provides that the state shall endeavor to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, otherwise, work, living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular the state shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

A significant aspect of the economic justice under the Indian Constitution is the provision in article 46 of the Constitution that the state shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the scheduled castes and the scheduled tribe, and shall protect them from social injustice and all forms of exploitation. There is a general provision for improvement of the standard of living under Article 47 of the Constitution. The economic justice covers under Article 48 of the Constitution the organisation of agriculture and animal husbandry on modern and scientific

lines. The entire scheme of directive principles of state policy projected in part IV of the Indian Constitution indicates that the leaders of the freedom movement wanted not only political independence but the economic and social regeneration of the country for providing maximum social and economic justice to her people. They hoped for a maximisation of the economic dimensions of justice for making the rural communities self-governing, for the abolition of untouchability, for raising the living standard of the people and for promoting the cause of international amity. The directive principles sought to reconcile the liberties of the individuals with the public good, reducing the rights of the few for the welfare of the many. It is clear that these problems of economic justice recognised as fundamental in the governance of the country and it is declared to be the duty of each state to apply these principles in administration of justice[9].

Constitution required that the state shall secure that the operation of the legal system promotes justice on a basis of equal opportunity and that the state shall in particular provide free legal aid by suitable legislation or schemes or in any other way ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. However, how far this constitutional principle is operationally manifested is an issue to be investigated.

Schemes for Legal Aid to the Poor

In order to analyse Economics of the Private Property Litigations in Kerala, it is necessary to evaluate the functioning of Legal Aid to the Poor Schemes existing in Kerala.

One of the existing statutory provisions for legal assistance to the poor is contained in Order XXXIII of the Code of Civil Procedure which enables such persons who can qualify as 'pappars' to sure 'in form a pauperis'. The code in such cases exempts a person from court fees payable otherwise. However, the relief thus provided is of limited utility

to the poor litigant. There are schemes for helping the poor litigant in Kerala. In Kerala, under the legal aid rules, as amended in 1958, a criminal accused or civil litigant may obtain a certificate from the Tahsildar, Probation Officer, or Official Receiver that he is a 'poor' person under the rules and then may apply to the court where the proceedings is to be instituted for legal aid. If accepted, he may then select an advocate of his own choice. In a civil suit, court fees will be waived where the plaintiff is a recipient of legal aid. Advocates fee for appearance in both civil and criminal case are prescribed by the rules. These fees are to be paid by the respective court on receipt of the advocate's statement of cost and the certificate of the assisted poor.

The legal aid schemes existing in Kerala have many practical problems. From the experience of other countries as well as our own, one can formulate the following issues which may require immediate consideration from all concerned with legal aid.

1. For the successful functioning of the scheme, there should be active participation and co-operation

from the state, the legal profession and informed public opinion.

2. The legal aid lawyers must be properly paid by the government.

3. Public financing on a permanent footing is a condition precedent for a broad-based legal aid scheme.

4. It is necessary to evolve a viable scheme under which the profession carries the primary responsibility for organising and administering the legal aid.

5. Legal aid will have to include advisory services also and in appropriate cases attempts will have to be made to bring about out of court settlement of disputes. In this area legal aid lawyers may have to work in co-operation with other welfare agencies.

6. A purposeful legal aid plan should consistently be predicated on data gathered by socio-legal research into the needs and problems of the poor.

7. An efficient and simple organisational structure is to be built up at all levels with the active co-operation of lawyers and public men for administering legal aid schemes.

8. A suitable eligibility test will have to be evolved which, while fully protecting the interest of the poor does not allow itself to be exploited by those who can afford to pay.

While evaluating the performance of legal aid schemes in Kerala we see that the Kerala legal aid rules make no provision for legal advice and consultation for the litigant. It makes only those situations in which either a criminal prosecution has been undertaken, or a person has decided to initiate civil proceedings or has become a defendant in a civil suit. Reasonable funding is essential for the successful functioning of these schemes. But in Kerala the funding for the scheme is quite low and government has not given prominent priority to the scheme. As far as a poor litigant is concerned, it is not easy to obtain the appropriate certificate for getting free legal aid. There is

a fear among litigants that an advocate employed by the government will not be as committed to the cause of his 'client' as would a private advocate, as well as an awareness that because these government advocates and pleaders handle a heavy case load, time spent on legal aid cases is likely to be minimal. The hindrances existing in the proper functioning of the legal aid to the poor schemes in Kerala are increasing cost of legal services.

Delay in the Disposal of the Suits

Delay in disposal of cases increase the cost of litigation. The various aspects of delay in the disposal of suits are discussed below.

If time bound disposal is made by the court, the litigant is able to minimise his litigation cost. The courts take too long a time to dispose of the disputes brought before them by the judicial process. Several times the Law Commission and other committees have gone into the matter of

judicial delays, but the problem remains still unsolved.[10]

The factors dealing to judicial work load may be broadly classified as extra-legal and legal. For example, with the increase in the population, there is naturally an explosion in the work of the courts. In addition, our society has become more complex than it used to be about four decades ago. These are extra legal factors. With the increase in welfare functions of the state new rights have come in to existence. The older right, such as contract and property, have been made subject to governmental regulation and control. New social interests are also pressing for recognition and by the courts. These factors may be described as legal. The law

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10 The matter of delay was considered by several committees also. In 1949 a committee was set up under the chairmanship of Mr. Justice S.R. Das for enquiring and reporting as to the advisability of curtailing the right of appeal and revision, the extent of such curtailment, the method by which such curtailment is affected and the measure which should be adopted to reduce the accumulation of arrears. In the year 1969 the Government of India constituted a committee headed by Mr. Justice Hidayatullah and later by Mr. Justice Shah which submitted its report known as High Court Arrears Committee Report. Apart from these at all India level, some committees were also appointed by different State Governments to look into the problem in their respective states.

commission has pointed out that the delay in the disposal of cases is caused by an inefficient and inexperienced Judiciary, insufficient number of judicial officers, agency, the diverse delaying tactics adopted by the litigants and their lawyers, the unmethodological arrangement of work by the presiding judge and the heavy file of arrears.[11]

Upendra Baxi[12] has classified the delay on the disposal of suits in the following ways:-

1. Court-caused delays.
2. Legal Profession -caused delays.
3. Litigant-caused delays.
4. The Civil Procedure System-caused delays.

I. Court-caused Delays

i. Disposal of arrears

The arrears filling up in the court is the major reason for the delay in the disposal of suits. The existence of a mass of arrears revealed that a judge can hardly be expected to take strong interest in the preliminaries, when he knows that the hearing of the evidence and the decision will not be by him, but his successor after his transfer.

ii. Inadequate strength of Judges

In spite of the growing volume of the court work, the strength of the judiciary has not been increased proportionately. The number of Judges is not increasing so as to speed up the disposal of arrears pending in the court.

ii. Civil and Criminal cases heard by the same court

There are few instance where the same judicial officer exercise powers over both Civil and Criminal cases.

Normally, the judicial officer should not in such cases fix both civil and criminal cases on the same day, as this causes great inconvenience to the counsel, litigants and the witnesses.

II. Legal Profession-caused Delays

i. Adjournments and piecemeal hearings

One of the important reasons for the delay in the disposal of cases is the widespread practice of the judicial officers to deal with the cases in a piecemeal manner, and their readiness to grant adjournment either for their own advantage or for the convenience of the parties or more frequently, the lawyers. Judgements in matters heard piecemeal cannot be delivered expeditiously as the judges are unable to keep the evidence adduced alive in their memory and such, for the purpose of making up their mind at the time of writing out the judgement they have to make elaborate study of the whole record.

ii. Lawyers and delay

Some advocates instead of settling the fee on lumpsum basis prefer to settle it on daily basis. It means that the fee of an advocate is directly proportional to the number of hearings. An unscrupulous lawyer can try to stretch a case to many hearings by seeking adjournments on one pretext or the other. This resulting in accumulation of arrears.

III. Litigant-caused delays

The excessive litigative behaviour of people is a major reason for the emergence of unlimited cases in courts. If disputes are settled by out of court settlements, grievance of the parties could be settled without much delay. Moreover, cases in courts are often adjourned for the convenience of the parties.

IV. The Civil Procedural System-caused delays

i.Procedural technicalities

The procedure prescribed for conducting the proceedings in courts is very complicated and time consuming. The fate of a suit depends upon the procedural techniques to

be gone through to bring it on the files of the court for adjudications. The first step in a civil suit is for the "service" of the defendant. On many occassions it takes more than six moths to secure the appearance of the defendant in the court. After the service of summons is secured another two months lapse in filing the written statement followed by two more months for framing of issues and submission of documents. It takes nearly a year for trial and one to two months more for arguments and judgements. The cross-examination of witnesses consumes a lot of time.

ii. Absence of modernisation techniques.

Modern techniques such as electronic devices and the like and the expertise of specialists in management and public administration, can be of immense help in containing arrears. However, in Kerala for proper administration of Civil Justice, these modernisation devices have not been properly utilized.

It is clear from the above analysis that inordinate delay in the disposal of suit is a major reason for high litigation costs.

PART III. Legal-economic Issues in Property

The important legal economic issues in property are analysed below.

The term "property" from both a legal and an economic standpoint, denotes the external objects of the world which are subject to ownership. When one says "his property is on the water front", he means that the land which he possesses is on the water front. But the term property has other implications which are more generally employed and are more useful, and it would seen from the point of view of both legal and economic analysis that the use of the term to denote external objects is misleading. It is the meaning denoted by the term property in the statement, "The land on the water front is his property" that is the concern of law and economics. When one says "the land on the water front is his property", he is saying that with respect to the land on the water front he has a claim against other individuals that they keep away from it.[13] "A property right is a socially enforced

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[13] Huntington Cairns - Law and the Social Sciences, London

right to select uses of an economic good. A private property right is one assigned to a specific person and is alienable in exchange for similar rights over other goods. Its strength is measured by its probability and costs of enforcement which depend on the government, informal social actions, and prevailing ethical and moral norms."[14]

Many theories have been advanced to justify the institution of property and a few of them have an important place in the history of social thought. They have contributed in varying degrees to the development of the current legal and economic conceptions of property and it will be necessary to review them briefly before considering the status of property in present -day legal and economic thought and analysing the economics of the private immovable property ligations.

(a) Occupation Theory

From the Roman jurists until recent times the act of taking occupancy of things which are without an owner with the

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Kegan Paul, Trech, Trubner and CO. Ltd., New York. Harcourt Brace & Co. 1935, p.122.

14 The New Palgrave :A Dictionary of Economics " edited by john Eatwell Murray Milagate, Peter Newman Vol, (3) p.144.

intention of making them one's own property, has been regarded as the principal method by which title was originally acquired. The theory attained perhaps its most generalized expression in Kant's Principle of External Acquisition: "Whatever I bring under my power according to the Law of External freedom, of which as an object of my free activity of will I have the capability of making use according to the postulate of the practical reason, and which I will to become mine in conformity with the idea of possible united common will, is mine."[15]

The principle of occupation best explains the acqyuisition of property among primitive people. But to an enquirer is mainly concerned with the place of property in advanced communities.

(b) The Labour Theory

The principle that when an individual incorporates his labour into an object it there by becomes his property.

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15 Kant, Philosophy of Law (trans. Hastie 1887), p.82.

Like the occupation theory, this theory was first advanced by the Roman jurists of the classical period.[16]

The labour theory is not immune from criticism. The important criticism can be directed to the fact that Locke[17] reasoned from a "state of nature" in which each workman was the independent creator of his own products. This is the golden condition of society of which Utopians dream, but today even the most revolutionary change in our economic structure could not make it an actuality.

(c) The Hegelian Principle

Property is the external sphere in which the free personality of the individual is realised. An individual, who is an end in himself, may appropriate things, which are means but not ends, for the satisfaction of his own wants. As the will of a particular individual becomes personal in property

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16 Girard, Mannuel elementarire de droit romain, 1901, p.13

17 Locke "Two Treatises of government" 1824, p.65

it is essential that property has the definite character of being his in particular.[18] This is the Hegelian justification of private property

(d) Legal and Economic Theories

Historically, the occupation, labour and personality theories of property which have been developed and all the three have played important roles in the formulation of the legal and economic principles of property.

For analysing the economics of private immovable property litigation, it is useful to enquire whether or not the economic conception of property has anything to contribute to the enlargement of the legal conception.

A Theory developed by Hobbes,[19] Montesquie[20] and

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18 Hegel, Grundlininen der Philosophie des Rechts, 1883 (Eng. trans. Sterrett, The Ethic of Hegel 1893, p.77

19 Hobbes, Leviathan 16551, p.91.

20 Montesquie, Spirit of Laws 1823, Book 26, Chapter XV, p.35

Bentham[21] has been termed the legal theory of property. This theory asserts that property is the creation of law and that, in the absence of law, there is no property. Bentham observed that "Property and law are born, and must die together."[22]

But the courts have developed a theory on property which is more properly describable as legal. This is the natural law theory according to which property is a natural right, superior to all human laws. The natural law theory has been most clearly stated by the Jowa Supreme Court. "The plaintiff needed no constitutional declaration to protect him in the use and enjoyment of his property against any claim or demand of the company to appropriate the same in their use, or the use of the public to be thus protected and thus secure in the possession of his properly is a right inalienable, a right which a written constitution may recognize or declare, but which existed independently of and before such recognition and

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21 Bentham Works, p. 308

22 Ibid, p.72

which no government can destroy."[23] This in brief is the theory of property as developed by the courts.

It is interesting to enquire whether or not economics, one of the basic concepts of which is property, has a more satisfactory theory to suggest as a substitute for the natural law theory.

Property, according to the classical economic theory, encourages a maximum of productivity, and this, wrote John Stuart Mill,[24] "is the best reason that can be given" for its justification. But there has been developed not only by economists but by political scientists and a few jurists as well, a conception of property based upon its social utility. This is the distinction between property for use and property for power, or, as it is now termed, the functional theory of property.[25] The essence of this theory is that property which

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23 Henry V. Dubuque, Pacific R.R. Co., 10 Iowa 540 (1860)

24 Quoted, Laveleye, Primitive Property (1878), 347. Cf. 1 Elt, Property and Contract, 70.

25 Tawney, The Acquisitive Society, 1920, chapter V.

involves the discharge of definite personal obligations, which fulfills a social purpose, is morally justifiable and that property which is passive, which is merely a claim on wealth produced by another's labour is morally unjustifiable. Mr. Tawney has drawn up rough classification of property rights based upon this difference.

1. Property in payments made for personal services.
2. Property in personal possessions necessary to health and comfort.
3. Property in lands and tools used by their owners.
4. Property in copyright and patent rights owned by authors and inventors.
5. Property in pure interest, including agricultural rent.
6. Property in profits of luck and good fortune; "quasi-rents".
7. Property in monopoly profits.
8. Property in urban ground rent.

9 Property in royalties.[26]

The roots of this doctrine lie in the rich field of medieval thought and reach dow to Aristotle. From the standpoint of the functional theory, the justification of property rests in the fact that property, when wisely used is for society a necessary condition of its health and efficiency and of its continued existence. This was the argument of Aquinas.[27]

The Marxist Analysis of Property

The Marxist analysis clearly regards property as the key to the control of modern industrial society. The capitalist, by virtue of his ownership of the means of production effectively controls society. He exercises the power of command which ought to be vested in the community. Hence, Marxist theory demands a transfer of the ownership and

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[26] Ibid.

[27] Thomas Acquinas, p.66 (Translated by the Fathers of the English Dominican Proinve, 1918.

the means of production to the community, which in the initial stages, exercises its control through a dictatorship of the proletariat and the coercive power of the state, until the latter 'withers away'. This key function of property and the establishment of a social order is part of Marxist philosophy. It maintains that with the transfer of ownership, substantially in all means of production to the community, the problem of social justice can be ensured.[28]

We saw at the outset that there were two basic problems of property: (a) the establishment of a theory of property in accordance with which it would be ethically possible to justify private property; and (b) the establishment of a principle from which it would be possible to deduce the proper distribution of wealth. We have seen in the occupation theory the labour theory and the personality principle, the important historic attempts, and their limitations and merits, to meet one or the other of these problems. The functional theory enables us to discriminate

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28 Fimilman "Law in a Changing Society", Unity Book House, Delhi -7, 1970, p.71

between different types of property, so that we may encourage those which are ethically legitimate and discourage those which are not. On the other hand the experience of different socialist countries shows that the Marxist analysis of the concept of property has practically undergone noteworthy changes.

Legal-economic Rationale of Property

Property has been treated as an expression of man's personality as a result of man's work for himself and for society or it is the result of the work of his predecessors in the family. Property is as old as civilization itself. It first came in the form of fruits or other natural products collected by man in the age of the Gatherers or in the form of cattle in the case of nomadic or pastoral tribes and in the agricultural stage it came in the form of landed property.

The economic value of the right of property is recognized in most systems of law. The hope of acquiring and disposing of property has been an important motive for man's economic activity. But this right is limited by the right of

other, by the rights of society. Man acquires and uses property under the protection of society. He therefore, acquires and uses property not only for himself but for other, his family, his society. Society which protects him in the possession of his property has a right to limit his right to property and its use according to the necessary needs of society, the welfare of his fellow men. But his right of society, also has to be exercised with due regard for the rights of the individual. Society may not restrict these rights to the point of total or even partial destruction. If property is to serve its purpose law must in the first place give it security. A proper balance between equality, security and liberty must be kept under any law of property which is to serve a progressive society. If private property is to be acquired for public purposes by the State due compensation ensuring justice to the individual must be paid. Any limitation of the right of property is to be judged not only by the principle of equality or public interest but also by their economic consequences. The Indian legislation n ceilings on land holdings must be judged by the economic effects. The English Law of Property Act of 1925 had provisions which secured the reasonable use of land for public

and private purposes. Laws which impose on land owners the obligation to ensure conditions of health, safety and other amenities in industrial areas will be justified by their economic advantages and purposes.

Similarly laws regarding transfer of property has to be judged by economic tests. The several modes of transfer - inheritance, intestate succession, sale, mortage, lease, exchange, trusts, endowments have to be judged by among other test like justice and equality also by the test of their economic consequence. But land should not be as easily transfered as movable property. The Indian Transfer of Property Act insists on registration of documents for the transfer of landed property, sales, mortage and leases. The possession of immovable property is protected in India by the provisions in the Indian Transfer of Property Act. The definition of immovable property is given in the Indian Registration Act, which is given as follows:

"Immovable property includes land, buildings, hereditary allowance, rights to ways, lights, ferries, fisheries, or any other benefits to arise out of land and

things attached to earth, but not standing timer growing crops or grass".

The Constitution of India as framed by the founding fathers in 1950 recognised the right to property as a fundamental right. However, by 44th ammendment to the Constitution in India, the right to property as a fundamental right was deleted. At present property right is limited to constitutional rights.

An enquiry regarding the evolution of civil justice administration exposes the fact that the pre-independence history of India to a great extent was a balancing effort between the legal ordering established by the British and the socio-economic objectives of people of India. In short "A legal system with people's judges and people's assessors in people's court is yet to be thought of."[29]

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[29] Sudarsanan Pillai P, "Justice in a Socialist State", Vyasadhwani, Annual 1980 Vadakkancherry, pp.4-6.

CHAPTER IV

ECONOMICS OF LITIGATION

This chapter presents the theoretical framework for analysing the micro economics of litigations. It discusses certain most-widely used methods for calculating aggregate gains and losses in legal-economic issues and presents the Model developed for the study. This chapter also deals with decision-making behaviour of the litigants. The economic factors and economic aspects of litigation are also analysed in this chapter.

The economist's approach to litigation is different from the approach of a litigant and a lawyer. Economics of litigation is an area where traditional legal analysis has little interest to investigate. The economic approach to litigation is beneficial to both lawyers and economists in the disciplinary as well as policy formulation spheres. Economic analysis of the litigation discerns the different type of costs incurred for the litigation and the net benefit realised from it. This approach may help to revamp the administration

of civil justice in Kerala.

The focus of economic analysis of litigation is the cost of legal services. The most elementary observation is that if legal services are expensive, people will be reluctant to use them. The Constitution of India makes provision for fair administration of justice. Article 39-A of the Indian constitution directs the state to ensure that the operation of the legal system promote justice, on a basis of equal opportunities and shall, in particular, provide free legal aid, to 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[1]. In spite of the constitutional provision there are umpteen instances where justice is denied to citizens as the real cost of legal services are heavy.

For the economics of litigation one has to assess the total gains and losses from litigation. A review of the

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[1] Article 39-A of the Ammended Constitution, Added by the 42nd Amendment Act, 1976.

major criteria for measuring gains and losses of legal issues may highlight the need for developing an original model for the present study.

Criteria For Measuring Gains and Losses

A number of tools and techniques have been developed for the economic analysis of legal issues. However, each of them has its own specific merits and drawbacks. None of those methods is applicable under all situations. The following are some of the major tools and techniques used in the economic analysis of legal problems. Economic theory is used to develop methods for economic valuation, a great variety of gains and losses.

Cost-Benefit Technique and Law

The most widely-used method for calculating aggregate gain and loss is the Cost-Benefit Analysis. The essence of Cost-Benefit Analysis is comparison of all the costs and benefits associated with a policy change. If the benefits should exceed the costs, there are grounds for

proceeding with the policy. It is important to note that the appropriate comparison is between what happens if the policy is pursued and what happens if it is rejected. In other words it is essential to have some way of predicting not only what will happen if we go ahead with the policy but also what will happen if we do not.

Let us take an example from law, there has been considerable controversy over legislation in the nineteenth century that gave great responsibility to employers for work accidents. It has been suggested that it is not sufficient to investigate whether safety records improved following the introduction of the more stringent rules. Rather, some assessment is needed of what would have happened to safety levels if the legislation had not been implemented to act as a base for comparing the outcome that the legislation actually produced. This is just like arguing that when compensation is being calculated in a tort claim, losses are measured by comparing the earnings prognosis before and after the event which occasioned the harm.

Hicks-Kaldor Test

This test relies upon the proposition that if those who gain from a policy change could at least potentially compensate the losers, then the policy change should be approved. If for example, improving airport facilities involves construction costs of Rs.100 lakh and will reduce property values in the neighbouring areas by Rs.20 lakh, but will bestow benefits on air travellers of Rs. 125 lakh, then construction should proceed. It will very often be impracticable to create devices that permit the gainers to actually compensate the losers and thus the test will be only hypothetical one, albeit one that will generally be able to produce a decision.

Pareto Test

According to Pareto Criterion any change that makes at least one individual better-off and no one worse-off is an improvement in social welfare. In other words under this test, a policy change is to be approved if and only if it makes at least one person in the economy better off but no one worse off. Since most government policies involve changes

that benefit some and harm others it is obvious that the strict Pareto Criterion is of limited applicability in real-world situations.

Rawlsian Criterion

The rationale of Rawlsian Criterion is that the appropriate test of a policy is to look first at its effects on the least well-off. Should these effects be deleterious, the policy is rejected, irrespective of the size of benefits that it may bestow upon the better-off.

Distributional Weights

This test proposes that explicit weights be assigned to the gains and losses accruing to different groups. That is to say that changes in the income levels of the less well-off may for example to be assigned more importance than changes in the income levels of the better off[2].

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[2] Roger Bowles, "Law and the Economy", Martin Robertson, Oxford, 1982 p.47-52.

The Equi-Marginal Returns Rule

The equi-marginal return holds that resources should be allocated between alternatives so that marginal returns are equal in all uses. Whenever marginal returns are unequal, then obviously resources should be allocated to the higher-yielding activity. The equilibrium position is reached when the marginal returns are equal in all uses so that the equalisation of marginal returns is the optimising technique.

The Second Best Theorem

The second best theorem holds that, in a complex world, to make one part of the economy Pareto efficient is not necessarily to make the entire economy better off. This principle states that a judge who gives an award for damages is not only fixing a price but simultaneously affecting incomes and resources.

The Compensation Test

The compensation test holds that if the gainers in a new situation receive sufficient benefit to compensate the

losers, and after the compensation is paid the losers will not have lost their original welfare level then that is a reason for choosing the new situation. Similarly, if the losers in the proposed new outcome are able to compensate the potential gainers so that they forgo their gains, then that is a reason for choosing the present situation[3].

The above mentioned methods can in principle be applied to a wide range of issues. Within a particular set of rules they enable us to assess damages or at least to establish losses. These methods show that economists are able to portray the unknown economic effects of legal issues. There are many fields of law to which a more thorough understanding of economic arguments can make a significant contribution to academic as well as policy formulation spheres. Therefore, it is necessary for the economist to try and orient his work in these directions. However, the various tools and techniques existing in the economic analysis of law are not suitable for analysing the different aspects of the

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3 Liver J.M., "Law and Economics" George Allen and Unwin Ltd., 40 Museum Street, London, 1979, p.23-31

research problem. Hence a Model has been developed for studying the micro economics of litigations in Kerala.

Litigant's Behaviour under Uncertainty

Under condition of certainty, where all costs are known to all litigants in advance, litigation is risk free: every litigant chooses the course of action that is most beneficial to him. Consumers of legal services are assumed to maximise utility, where utility depends positively on the levels of economic benefits obtained. In the event of uncertainty, the concepts of certain cost and value are no longer sufficient: something has to be said about how litigants respond to being unsure about what costs they will incur or what gains they make.

The analysis of behaviour under uncertainty is based upon the proposition that litigants can make coherent and consistent choices between alternative courses of action, where the outcomes associated with one or more of these courses of action contains some element of uncertainty or risk. Choices of this kind can generally be characterised as

being amongst alternatives each of which has a number of possible outcomes, each outcome being expressed in terms of a financial gain or loss[4]

The Game Theory Approach

Traditional tools of economic theory are not effective for analysing litigants behaviour under uncertainty. The Theory of Game could be used as an analytical apparatus for analysing the behaviour of litigants under uncertainty. The Game Theory lays down a rational course of action to an individual who is confronted with a highly uncertain situation. The final outcome of such an uncertain situation depends not only upon the actions of the individual in question, but also upon the action of others who are faced with similar problem of choosing a rational course of action. To be precise, the individual concerned faces a problem similar to that of the player of any game, say, the game of

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[4] Roger Bowles A. "Economic Aspects of Legal Procedure", "The Economic Approach to Law" ed. by Taul Burrows and Cento. G. Veljanoski, Butterworth, London Boston Sydney Wellington Durban Toronto, 1981.981.

chess[5]. The Game Theory approach to litigants is a useful tool which might lead to valid conclusions about the decision-making process of litigants in real world situations.

The game theory is applicable to a diversity of problems. It has been widely used in economics, business administration, sociology, political science as well as in military planning. We shall discuss the theory in relation to the decision-making behaviour of litigants only. As is well-known, the player has to select one among a variety of possible courses of action technically known as 'strategies'. "A strategy is defined as a complete set of plans of action specifying precisely what the player will do under every possible future contingency that might occur during the play of the game". There are several strategies open to the player; he has to select one out of them. This applies to the decision-making behaviour of litigants as well. A litigant

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5 Neumann, J., Von, and O. Morgenstern, "Theory of Games and Economic Behaviour", Princeton University Press, 1944.

has to select one out of several strategies open to him. There are three strategies open tot he litigant (1) making an out of court settlement and thus avoiding the litigation; (2) avoiding the litigation; and (3) deciding to litigate. A litigant could select any strategy best suited to his interests. But while selecting a particular strategy, the litigant will have to take into account the effects of the possible strategy adopted by his rival. The final outcome would depend upon the interaction of strategies adopted by both the plaintiff and the defendant in the game. The theory is applicable to a pair of litigants who are making dispute for some given private immovable property. What is gained by one is lost by the other.

The game theory is based upon an important assumption. According to this theory, a litigant, while selecting his strategy, will assume that the rival will adopt a strategy which will be most unfavourable to his interests. The game theory also assumes that a litigant knows all possible strategies open to him as well as those strategies available to the rival.

The game Theory and Litigants

Litigants in the four districts of Kerala are classified as three groups based on their decision-making behaviour. 'Risk Averters' are not interested in taking risk and they always prefer to out of court settlements. They are not interested in unfair prospects from litigation. 'Risk Neutrals' will take fair litigations and avoid unfair litigations and thus be indifferent towards taking risk or avoiding risk. 'Risk Takers' are interested in unfair prospects from litigation and they are ready to take up risk for getting maximum benefit from litigation.

If a litigant, say a risk averter, plaintiff, is agreeing for an out of court settlement, the defendant correctly guess the position of the plaintiff and in order to exploit this situation he may turn as a risk taker and decide to litigate. then the plaintiff also be forced to act as a risk taker and finally it will end up in litigation. Hence, it is to be inferred that a decision taken by a litigant will have an appreciable effect on the decision of his rival.

The game theory approach could be applied to the decision-making behaviour of litigants in out of court settlements too. For example, in a dispute relating to a private immovable property, both plaintiff and defendant have decided for an out of court settlement. From the plaintiff's point of view, the best strategy is to try and create the impression that he will settle only for an amount that is close to the expected value of the disputed property. If the defendant knows that the plaintiff is very averse to taking risk, he may exploit this position by offering much a smaller sum in settlement. Then the plaintiff may reject the offer made by the defendant. These types of decision-making behaviour of litigants may sometimes end up in a fair out of court settlement and sometimes in litigation. These trend pin points to the fact that the result of the litigation would depend upon the interaction of strategies adopted by both the plaintiff and the defendant in the game.

MODELLING THE MICROECONOMIC EFFECTS OF LITIGATION

The cost of civil litigation has received considerable attention by economists and legal professionals,

as well as public at large concerned with the micro economic impact of civil litigation. Given the increasing cost of litigation, certain key questions are now being raised: Is cost of legal services reasonable to litigations ? If not, what are the real micro economic effect of litigation, and to what extent can various policies ensure fair administration of civil justice ?

In order to study the economics of the private litigations in Kerala the following model has been developed.[6] Since the purpose of the model is to economically evaluate micro costs and benefits associated with litigations, social cost rendered by state for fair administration of justice is not considered. The model is developed for empirically verifying the economic rationale of litigations. It provides

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6 The model developed for the study uses the legal-economic theoretical premises formed by the following economists.

1. Becker G.S., "The Economic Approach to Human Behaviour", University of Chicago Press, 1976.

2. Hirsch W.Z., "Law and Economics-An Introductory Analysis", Academic Press, New York, 1977.

3. Roger Bowles, "Law and the Economy", Martin Robertson, Oxford, 1982.

three cost-benefit positions for empirically analysing the litigation scenarios. The empirical study is done by primary data which have been collected taking into consideration the opportunity costs of litigation. With the help of the model the issues emerging from the economic evaluation of the net benefits in litigations have been identified and recommendation are proposed for improving the present civil justice administration.

In the model section I, highlights the utility maximising behaviour of litigants. Section II, discusses the theoretical approach for the estimation of total economic cost of litigation. The three cost-benefit positions for the empirical verification of the research problem are presented in Section III. Section IV, provides the assumptions of the model. Policy implications of the analysis are discussed at the end of the study.

I. Utility Maximisation in Legal Services

The model is based on the basic assumption that a litigant is rational. Rationality means that the litigant

will decide to litigate only when he believes that he will be getting some net economic benefit. So before deciding to go for litigation he will be comparing the costs and benefits associated with the litigations. In case he believes that litigation will result in economic loss, he will prefer an out of court settlement or no litigation at all. This highlights the fact that a rational litigant will ways aim at maximising of economic benefit or minimising of economic cost in the private property litigation. In the model all micro private costs and benefits are estimated in terms of money. Hence, non-monetary aspects of private justice are disregarded in the model.

In the process of rational decision making the litigant is considering various choices. He can take a decision either to litigate or not to litigate. Sometimes he may prefer an out of court settlement. Even if he is losing in his litigation he expects only minimum economic loss by way of incurring economic cost. In other words, the utility maximising postulate is absolutely applicable to a consumer of legal services. Based on the utility maximising behaviour of litigants and the decision-making behaviour of litigants as

per the game theory approach, litigants have been classified into the three groups as Risk Averter, Risk Neutrals and Risk Takers.

II. Estimation of Total Economic Cost of Litigation

In addition to the direct monetary expenses by way of litigation costs, certain legitimate earnings are forgone by the litigant for the planning and operation of the suit. Hence this opportunity cost also should be included in the estimation of the total costs. Total benefit to the litigant is the actual monetary gain from the litigation. The net economic rewards from the suit can be calculated by deducting total economic costs including opportunity costs from total economic benefit. By and large, litigants are not including opportunity costs for the estimation of total costs.

Justice in the private property litigation 'pj' is obtained by deducting total economic cost 'tc' from the total monetary quantification of the subject matter in the litigation or the total benefit 'tb'. It is equal to net benefit 'nb'. Total cost 'tc' includes accounting cost 'a'

and opportunity cost 'o'. Accounting cost means those costs which involve cash payments by the litigant in his litigation. The different components of opportunity cost include the normal return on money capital invested by the litigant in his own litigation which he would have earned if invested it outside and the wages or salary for his services forgone, if any, and the money rewards that would have been attainable for the factors the litigant himself owns and employs including the time etc.

It can be represented as follows:

$$pj = tb - tc$$

$$= nb$$

$$\text{where } tc = a + o$$

The present study includes both accounting cost and opportunity cost for the estimation of total economic cost.

III. Cost-Benefit Positions of Litigation Scenarios

For the empirical investigation of the research problem the following cost-benefit position could be used.

tc > tc .....(a)

tb = tc .....(b)

tb < tc .....(c)

In position (a) i.e. tb>tc In this position total benefit is grater than total cost and seeking justice in the private property litigation is desirable. The greater the difference, the greater will be the desirability.

In position (b) i.e. tb=tc In this position total benefit is equal to total economic cost. Here the litigation is in no profit and no loss position, it means that the litigant is getting revenue equal to the total of accounting and opportunity cost and no more. The litigant has no net benefit from this position.

In position (c) i.e. tb<tc Here total benefit is less than total cost and seeking justice in the private property litigation is not desirable.

IV. Assumptions of the Model

The three important assumptions which underlie the modeling of the micro economic effects of litigation scenario can be briefly listed as follows:

1. Litigants are rational.
2. Cost and benefit of litigation can be measured in terms of money.
3. Absence of non-monetary considerations in litigation.

Conclusion

With the help of the Model[7] the different aspects of the micro cost-structure of the private property litigations in Kerala could be analysed and it helps to identify and quantify the economic effect of the suits on measurable

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[7] The model is developed in tune with the World Bank-style model building method for studying different operational problems in economics. The analytical rationale of the model is based on the researcher's observations.

monetary variables. The administration of civil justice system ensures operational efficiency only if tb>tc i.e., the economic benefit to the litigant is greater than the economic cost he incurs. In other words, the administration of civil justice, with regard to the private property litigations, should ensure maximum benefit and minimum cost to the consumer of legal services.

Rationale of the micro economic Modeling of the Litigation

Economics of the litigation can be tackled at three levels. The fist is to evaluate the micro economics of litigation. The second is to assess the efficiency of civil justice administration and the third is to prescribe proposals for ensuring maximisation of benefit tot he consumer of private legal services.

Litigation is a non-market activity which can be approached with the apparatus of new-classical economics[8].

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[8] Becker G.S., The Economics of Discrimination, University of Chicago Press, 1957.

The economic approach to litigation is based on the analysis held by some economists that the core of economics, the theory of choice, is in principle applicable to all human and institutional behaviour[9]. The fundamental ideas embodied in the economic approach to law are those of utility maximisation, stable preferences and opportunity costs[10].

Positive Analysis of the Model

The Model developed for the study has positive as well as narrative dimensions. Positive economic analysis of law seeks to explain the structure of the legal system as it is.

The main criticism that the civil lawyers may moot against the model is that the Model is too simplistic and does

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9 Meckenzie R.B., In the Methodological Boundaries of Economic analysis, Journal of Economic Issues, 12, No. 6, 1978 p.p627-645-645

10 Becker G.S., "The Economics Approach to Human Behaviour", University of chicago Press, 1976.

not capture full complexity of the legal phenomena which the model seeks to portray and the assumption are unrealistic. In response to this, it may be stated that it is not the Model's assumptions that are to be verified but its analytical process and predictions.

The techniques of positive economics are most important to 'legal impact studies' or what Hirsch has called 'effect evaluation'. Legal impact studies seek to identify and quantify the effects of law on measurable variables[11].

The present study raised and tried to answer to the following two questions.

1 What are the economic effects of litigation ?

2. Have the objectives civil justice administration been attained ?

For answering these questions an empirical enquiry

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11 Hirsch W.Z., "Law and Economics - An Introductory analysis" Academic Press, New York, 1977.

has been conducted. It is generally agreed among the public that the litigation must ultimately be evaluated in terms of its success in achieving its economic goals and not purely in terms of its formal legalistic point of view.

Normative Analysis of the Model

The aim of the normative economic analysis of law is to identify the situations in which private and social allocative efficiency are not attained and to prescribe suggestions for improving them.

The analysis begins with the working of the model. Justice in the private property litigation 'pj' is obtained by deducting total economic cost 'tc' from the total benefit 'tb'. It is equal to net benefit 'nb'. Total cost 'tc' includes accounting cost 'a' and opportunity cost 'o'. It can be represented as follows:

$$pj = tb - tc$$

$$= nb$$

$$\text{where } tc = a + o$$

Litigants are generally not considering the reasonable earnings forgone by them for the planning and operation of the suit. For estimating the real economic cost, the opportunity cost of the litigation should also be included. In the process of benefit maximisation, along with the accounting cost a consumer of private legal services should consider and compute the different elements of the opportunity cost too.

The economically desirable position for the litigant i.e., is tb >tc. In this position total benefit is greater than total cost and seeking justice in the private property litigation is desirable. The greater the difference the greater will be the desirability. This is the ideal position for the litigant where utilisation of economic resources for the litigant is economically efficient. An economically efficient allocation of resources will imply an allocation that is economically efficient from the litigant's point of view who participated in the litigation. In other words economic resources of the litigant are to be efficiently allocated where total benefit exceeds total cost. From the normative angle, the litigation should show economic

efficiency even after including the opportunity costs because it places the utilisation of every economic resources that is used for the litigation makes the greatest possible contribution and tends to reward every litigant maximum economic benefit. This is the ideal situation of the litigation where litigant's economic resources are allocated to their highest comparatively valued uses.

The departure from the ideal position i.e., the >te is referred to as operational inefficiency of the civil justice system and invites the intervention of the State to ratify it. Although deviation from the ideal position may result from many factors viz. delay in the disposal of cases, access to legal services, delay in the execution of the decree etc., the most important one in the economic analysis of law is the consideration of opportunity costs.

Economic Factors and Litigation

Attainment of the ideal position in the model to a great extent depends upon the economic capacity of the litigants. This is because, for the employment of legal

services, a litigant has to utilise economic resources. The main issue that comes before the civil court is economic in origin and the litigants want to protect or improve their economic interests. The economic factors seem to have a significant effect on the costs and benefits of the litigation and the decision to settle out of court.

The major economic factors which are influencing the litigation are given below:

1. Litigation may be avoided due to the inability of incurring economic costs.
2. Litigants may lose in their suits owing to the inability of employing talented lawyers due to their heavy fees.
3. Out of court settlements may be made even incurring financial loss considering the prospective heavy costs.
4. Litigations may be discontinued due to the insufficiency of fund to meet the economic costs.
5. Inordinate delay in the disposal of the suits may increase the cost of litigation.

6. Execution procedures and the delay involved in it increases litigation costs.
7. A financially weaker litigant is forced to incur unreasonable costs when his opposite party is financially well off.
8. The opportunity of going for an appeal may be lost due to the inability of incurring heavy costs involved in it.

The litigation is a function of the economic capacity of the litigant means that economic resources are needed for litigation or the litigant should have adequate purchasing power for entering into the legal service market. Hence we may presume that the greater the resource position of the litigants, the greater will be their command for employing legal resources from the legal service market.

Though lawyers play a dynamic role between the court and the litigant, they are not considering the excessive trend in litigation cost. The legal education within which lawyers are trained and the existing civil procedures etc. are not creating proper cost-consciousness among advocates.

Litigants and Judiciary

The provision of legal services and its costs is a matter that has not attracted considerable interest of the judiciary. While administering civil justice, the court is not considering the real economic cost incurred by the litigant. Judiciary is mainly concerned with the enforcement of civil rights as per the available material evidences. The court is only considering the statement of cost presented by the concerned lawyers.

It is natural to believe that litigants may be expected to prefer cheap legal services to the present expensive ones. But the present lawyer-client relationship and administration of civil justice are such that they are not in a position to reduce litigation cost and provide maximum economic benefit to litigants.

Lawyers Approach Versus Economist's Approach

There is difference of opinion between economists and accadamic lawyers on the economic analysis of litigation.

Lawyer may not always consider the different type of costs involved in litigation. Lawyers are mainly concerned with factual descriptions with formal legal prepositions supported by arguments. A lawyer may not consider the total cost incurred for litigation and the net economic benefit derived from it. The economist on the other hand consider the costs and benefits of alternative choices before taking the decision to litigate, because the resources of litigant are limited. As far as an economist is concerned, the resources used in litigation have economic value. The decision t litigate for example, consumes economic resources, that will then be not available for other uses. This economic approach to litigation help in estimating the real value of resources expended for the litigation. This approach is also helpful for drawing attention to the hitherto unrecognised economic effects of litigation namely the opportunity cost of litigation.

Decision Making of Litigants

Decisions about litigations in private property are an essentially practical matter. From the economic point of

view they can be approached with the apparatus applied to decision making under 'uncertainty'. Before taking a decision to litigate both the plaintiff and the defendants would consider the prospective cost involved in going for the cases and the benefit from so doing, because they have only limited resources at their disposal[12]. When both the plaintiff and defendant are rational, they will try to maximise their economic benefit and minimise their economic cost.

Some parties always take the decision to litigate for getting more economic benefit. However, the comparative benefit of an out of court settlement from pursuing a case is to be determined only after empirically evaluating the costs and benefit of the different private property litigations from both these categories. Suppose, for example, there is a dispute of an immovable property worth Rs.10,000/- and the defendant offered Rs. 8,000/- for settlement. The fact that to settle now involves only a loss of Rs.2,000/- and the plaintiff has to decide whether or not to proceed with suit.

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12 Roger Bowles, "Law and the Economy, Mart in Robertson", Oxford 1982, p.199.

The next round of negotiation may add Rs. 1,000/- also to the plaintiff and it will be worthwhile to pursue the case if and only if there is a good prospect of getting more economic benefit than this Rs. 9,000/-. In other words to proceed with litigation is wise only if the net additional benefit is positive.

The main feature of negotiation is that one cannot predict how the other party will respond to the offer. There are three possible outcomes associated with taking the case into court: an award of zero if the facts are not proved, a full award, and an award that is in some proportion of the full award.

Litigants may be classified into three groups based on their nature of decision making behaviour. Certain litigants are interested to take risk for getting maximum benefit from litigation. On the other hand some are not interested in taking risk and they always prefer an out of court settlement even if financial loss is involved. Certain other litigants will take fair litigations and avoid unfair litigations and thus be different towards taking risk or avoiding risk.

From the plaintiff's point of view, the best strategy is to try and give the defendants the impression that he will settle only for an amount that is close to the expected value of the claim. If the defendant correctly guesses that the plaintiff is very averse to taking risk, he may exploit this information by offering much smaller sums in settlement. Then plaintiff may rejecting the offer made by the defendant[13].

Settlement Versus Trail

Trying to reach a settlement in the private immovable property litigation is like the process of negotiating to buy an item from a market. Buyers start by making low bids, sellers respond by offering high prices and so begins a process of negotiation which may end with the buyers going away empty-handed or reaching a point where both are happy. In the case of a suit, if the matter is not settled quickly then it will be necessary to collect the

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[13] Ibid P.191-194.

necessary evidence and to prepare for the possibility of a trial. Once this has been done, costs may be relatively limited until a trial actually takes place. The final stage is likely to be very costly, and one or other of the parties will find himself paying the bill. The parties will generally be interested to reduced the litigation costs. Whatever rules govern the assignment of litigation costs between the parties, the party confronted by the likelihood of having to pay the trial costs will be very anxious to avoid a trial and will adjust his offer to settle or his decision to accept an offer accordingly. Settlement at this juncture may avoid a significant proportion of counsel' fees. There are different reasons for quick settlement which are listed as follows.

1. The parties take very similar views about the likely outcome of a court hearing of the case, or the plaintiff takes a pessimistic view;
2. The cost a trial are in relation to the amount of damages.
3. The parties are represented by lawyers who are anxious for an early settlement.

4. The plaintiff is more averse to taking risks or is more impatient than the defendant.
5. There are inordinate delay in the disposal of cases.

As one might expect, the factors for most cases that go to trial include plaintiff being prepared to take risks, and plaintiffs taking more optimistic views of their prospects of success. In addition they expect that decisions by a court is more economically beneficial than out of court settlement.

It is clear that the plaintiff's decision about whether or not to go to trial depends upon certain factors. It looks more carefully now at the size of offers made by defendants. It may be noted that any offer to settle may be influenced by the defendants own attitude towards the risk. The nature of litigation costs, the rate of interest payable for the money borrowed for the litigation and the prospective net benefit from the suit etc. are the other different factors considered by the defendant for making an out of court settlement.

Advocate's Fee

If one has decided to litigate, he has to employ an advocate. Advocates rely heavily upon the fees as a main source of income. Without the legal monopoly of the right to provide and charge for such services, the legal profession would be less profitable. The following are the different factors for the variations in advocate fees.

1. The complexity of the subject matter.
2. The skill, labour, specialised knowledge and responsibility involved on the part of the advocates.
3. The number and importance of the documents prepared and presented.
4. The time expended by the advocate.
5. The amount or value of the property
6. The importance of the matter to the client.

Courts Fees

A brief survey of the legal-economic rationale of the Court fees and Suit Valuation Act Existing in Kerala aims that some special service is intended or envisaged as a quid pro quo to the class of citizens which is intended to be benefited by the service. This Act also aims that there should be a broad relation between the amount so raised and expenses involved in providing the services.

Economic Aspects of the Legal Services

Discussion of the provision of legal services generally involves two different types of argument, namely issues of efficiency and issues of distribution. From an efficiency point of view, it is important that the price of legal services should properly reflect the cost of providing them. This is because of the reason that only in such circumstances resources will be sensibly allocated either within the legal sector or to the legal sector as against other sectors of the economy. From a distributive point of view the concern is to ensure that existing legal services are

fairly distributed. Views about what constitutes a fair distribution differ widely: some people will argue that willingness to pay the going market price is the best criterion for judging who should get legal services while others would argue that some notion of legal need is the prime concern[14].

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[14] Roger Bowles., "Law and the Economy", Martin Roberston, Oxford, 1982, p.204

CHAPTER V

AN ANATOMY OF LITIGATION COSTS AND BENEFITS

This chapter focuses the conceptual and computational aspects of the cost-benefit structure of litigation with special emphasis on opportunity cost. The civil procedural approach as well as the economist's approach to litigation costs are analysed in this chapter.

The scrutinisation and analysis of the true cost burden associated with litigation is important for analysing the micro economics of litigation. There exist several kinds of costs, and one should be very careful about what cost to be used and for what purpose. This study is based on the assumption that for any evaluation regarding net benefits from litigation, one should include the direct, indirect, hidden, and opportunity cost of litigation.

Private costs of litigation refer to that part of total cost which the litigant is to meet. Private benefit is defined as that economic benefit which is enjoyed by the litigant from the litigation. Private cost is usually defined

in opportunity cost terms as the highest valued or most preferred option foregone. Every choice entails a sacrifice. There is always an option 'necessarily forgone' Hence every choice entails some cost-the opportunity cost[1].

State is rendering social cost for maintaining judicial infrastructure. These costs include the costs for the construction and maintenance of court buildings, the salaries of judges and other officials etc. Since the present study is confined only to the economic evaluation of micro costs and benefits associated with litigations, public expenditure for administration of justice is set aside.

The objective of private cost-benefit considerations to a litigant is to assess the amount of money by adding up the costs and benefits of alternative economic choices and selecting the alternative which offers the highest net benefit. Resources of a litigant are being used most

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[1] Graaf J. Dev. "Social Cost" The Invisible Hand ed. by John Eastwell MurrayMIlgate, Peternewman, Ist Edn. 1987, p.251.

efficiently when the benefits over costs are at a maximum. The decision to litigate affects the resource position of a litigant; seeks to maximise benefit relative to costs of resources used in litigation.

A decision to litigate involves choice among alternative courses of action. To make a rational choice, the litigant must evaluate each alternative and determine what it will contribute towards the attainment of the objective of maximization of benefit.

Generally cost of a resource is to be thought of as representing the value of the most attractive alternative use to which it could be put. When a consumer buys a car, for example, the cost he incurs is essentially that some part of his wealth in exchange for the car. Once he surenders his wealth, he will not be able to use it for any other purpose. The presumption is that the decision to buy the car implies that the consumer puts a higher premium upon car than upon any other bundle of goods and services he could buy with the same amount of wealth. The 'cost' of buying a car is given by the opportunities that one there by forgoes. Similarly 'cost' of

taking a job will be the loss of leisure, time and energy that one could otherwise have used in enjoyable pursuits or in some of the job open to one. So also when a litigant enters into litigation the cost he incurs is that he will have to forgo some part of his total savings or other wise which he will not be able to use for any other purpose. The assumption is that the decision to litigate in the private property implies that the litigant puts a higher premium upon the litigation than upon any other things and services he could buy with the same amount of savings. A litigant intending to litigate in the private immovable property disputes has several alternatives for using his limited savings. He can use it for buying a government security which will yield profit in the future. He can deposit the money in a bank or can use the money for some productive business enterprise. In spite of these alternatives, he is taking the decision to litigate. Hence, the cost of the litigation will be the loss of money, time and energy that the litigant could otherwise have used in some other productive pursuits or in some other investment open to him. When he is taking the decision to litigate, he expects benefits. Being rational he calculates the different types of benefits in monetary terms. He expects real economic benefits

from litigation. Whether he has acquired, real economic benefit or not is to be determined by evaluating the real costs he incurred for the litigation. Hence he must be aware of the real costs involved in litigation[2].

For estimating the real economic cost of litigation the opportunity cost of litigation should also be included. The cost of having one's wealth tied up in the form of pursuing with a litigation is that the litigant is missing the opportunity of holding the same volume of savings in forms of other assets. In order to estimate the net economic benefit from litigation, the next best alternative forgone for litigation is to be taken into consideration. The litigant has however, the three following important choices.

1. Avoid litigation and use the money for some productive purposes.
2. Make an out of court settlement and
3. Enter into litigation.

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[2] Hirsch W.Z., "Law and Economics - An Introductory Analysis", Academic Press, New York, 1977.

The choice that the litigant makes between these alternatives will reflect among other things, the individual's inclination to accumulate assets, the attitude of the opposite party in the litigation and the risk bearing nature of the litigant etc[3].

Nature of Cost-consciousness in Litigation

From an economist's point of view decision about litigation can be approached from the apparatus applied to decision-making under uncertainty. There are two categories of risk - one the probability of which can be calculated and be insured against, and the other probability of which cannot be calculated so that it cannot be insured against. Though the probable loss from litigation can be calculated, at present there is no provision of insurance for covering the risk involved in litigation. For knowing the nature of cost-consciousness in litigation and to evaluate the trend in the cost-incurrence, litigants in Kerala have been classified

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[3] Hrishleifer J., "Price Theory and Applications", London: Prentice Hall International Inc.

in three categories[4].

1. Risk Averter

Risk Averters are those litigants who are reluctant to take risk and always prefers to out of court settlement for the redressal of their grievances. As per the cost-benefit position of litigation scenarios stated in the Model, risk avertors are assumed generally to be in the tb>tc position. In this position total benefit from the litigation is greater than total cost and so seeking the procedural justice is desirable. Greater the difference, greater will be the desirability.

II. Risk Neutral

Risk neutral litigants are those litigants who accept only fair litigation and avoid unfair litigation. As per the analysis of the Model the final cost-benefit position of the risk neutral is assumed as tb = tc.

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[4] This Classification is made in the model which is explained in Chapter IV.

II. Risk Taker

Risk takers prefer to take risk for getting maximum benefit from litigation. They even expect unfair prospects from litigation. The Model developed for the study assumes that they are by and large in the tb < tc position.

The different behaviour of litigants under conditions of uncertainty reveals that costs of litigation are not known to litigants in advance. Under conditions of uncertainty litigants find it difficult to choose that course of action which is most beneficial to them. In such a context consumers or legal services could not be assumed to maximise economic benefit. However, the above mentioned classification of litigants is based on the nature of litigants under conditions of uncertainty[5].

The classification of litigants as risk averters, risk neutrals and risk takers is made for analysing the

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[5] Mitchell Plinsky A., An Introduction to Law and Economics, Little Brown and Company, Boston and Tornto, 1983.

behaviour of litigants in the four districts of Kerala. The changes in the behaviour of litigants after having proper cost consciousness throw light upon the fact that real cost awareness plays a key role in the decision to litigate.

Economic Evaluation of Litigation Costs

The litigation costs can be analysed at two levels. First, the Civil Procedural Approach to litigation costs, i.e., costs as per section 195 of the Civil Rules of Practice in Kerala.* In this approach litigants are considering only the direct cost. Second, the economist's approach to litigation cost where the true litigation costs are estimated.

For the estimation of total economic cost both explicit and implicit costs should be estimated, for which, both accounting cost and opportunity cost are to be analysed and determined. The economic cost in a litigation can be estimated by analysing the structure of direct, indirect, hidden and opportunity cost of litigation.

Structure of Direct Cost

The structure of direct cost is included in the Civil Rules of Practice in Kerala which is shown in Appendix I

1.Structure of Indirect Cost

The different items that can be included under indirect costs are listed as follows:

1. Travelling expenses
2. Dearness allowance
3. Wages or salary to the labourers employed in litigation
4. Rate of interest, if the money is borrowed.
5. The expenses incurred for executing the decree.

Structure of Hidden Cost

The hidden costs that are involved in litigation are the following:

1. Financial loss due to the mental agony resulting from the suit.

2. Financial loss due to negative impact of litigation on occupation of the litigation.
3. Expenses incurred for the criminal offenses consequent on the civil suit.

Structure of Opportunity Costs

The various ways by which the opportunity cost of litigation may be emerged are listed below:-

1. The normal alternative returns from the money expended on litigation.
2. The earnings that could have been made by the alternative employment of litigants managerial ability.
3. Normal return that could have obtained from disputed property
4. Reasonable return on the money borrowed for litigation, if invested outside.
5. Difference between the real interest rate and interest rate fixed by courts.
6. Money rewards for factors owned by litigant and employed in litigation including time.

When a litigant decides to litigate he has to pay prices for the factors which he employed in his litigation. He thus incurs direct, indirect,t hidden and opportunity costs. An accountat will consider only the payment and charges made by litigant to suppliers of various legal services. But an economist's view of cost is somewhat different from this. The litigant spends certain amount of money for his litigation. If that money were invested elsewhere it might have earned certain amount of interest or dividends. Moreover, a litigant devotes time to his litigation, and contributes managerial ability to it. If he had not entered into his litigation he could have utilised his managerial ability and time for some other productive purpose. The economist would therefore include in his cost of litigation (1) the normal return on money rendered by litigant on litigation which he could have earned if invested outside, and (2) the wages or salary he could have earned if he had utilised his services to some other productive purpose. The economist take into consideration all types of cost incurred for litigation. In order to determine the net benefit from litigation, both the explicit and implicit litigation cost should be estimated. However, an ordinary litigant is

considering only the Civil Procedural Approach to litigation costs where he is estimating only direct costs. But a litigant should take into consideration not only direct cost but also the other different components of litigation costs.

ECONOMIST'S APPROACH TO LITIGATION COSTS

Litigants are usually motivated by plain common sense regarding cost-benefit in litigations. Decision-making behaviour of litigants are not generally based on any rational analysis. However, a litigant who is assumed to be rational should have economic reasoning. Economic approach to litigation can help in taking practical litigation decisions. For example, a litigant intends to enter into a civil suit related to an immovable property worth on e lakh rupee. This party has a definite option for an out of court settlement sacrificing ten thousand rupees. If the litigant is a 'risk-taker' he may consider for the litigation in anticipation of maximum economic benefit. Sometimes his advocate also may favour for the litigation. However, he has to spend an average period of four years for the first decision. If the first decision is not in his favour he has

to spend again four years for the decision from the appeal. The total economic costs for the litigation may amount to approximately Rs. 25000/-. The result of the decision cannot be predicted as there is uncertainty. If the party is seeking the advise from an economist, he may advise not to proceed with the suit. Mere commonsensecan be frequently misleading. A single economic concept, opportunity cost, helped the economist to form a rational advice. If Mr. X is making an out of court settlement by sacrificing Rs. 10000/-, he will be able to utilise the remaining Rs. 90000/- in several economically beneficial alternatives. If he is taking a decision to litigate he will be able to obtain only one lakh rupees. In this position he is not able to enjoy more economic benefits than the economic benefits from the out of court settlement.

Economic reasoning explains why and when a decision regarding litigation is to be taken. A litigant, who is assumed to be rational should be able to construct an arithmetical hypothesis which could increase his benefits or reduce his losses. Certain key concepts are very powerful for drawing rational conclusion from the problems related to the

decision to litigate. A number of concepts that meet these criteria are listed below. The list is based on the literature on economic analysis of law.

1. Opportunity cost
2. Rational consumer
3. Utility maximisation
4. Resources allocation and the Equimarginal principle.
5. Financial objectives-interrelationship among long and short-run profits
6. Present value and discounted cash flow
7. Private cost-benefit analysis.

The utility maximisation behaviour of litigants could be analysed with the help of the above mentioned concepts in the economic analysis of legal issues. The analysis which could be made through different theoretical expositions may draw light upon the various ways by which a litigant could maximise his ne benefit from litigation[6].

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6 Landes .W "An Economic Analysis of the Courts". Journal of Law and Economics, 14, pp.61-107, 1974.

Rational Decision-making in Litigation

The rational approach to decision-making in litigation includes the following elements.

a. Identification of the economic objectives involved in the civil dispute.

b. Identification of the opportunity cost in the litigation.

c. Structuring of what one knows about the phenomenon involved in the decision under consideration -model building

d. Identification of alternative actions available.

e Identification of the effects of each attractive alternatives.

f. Evaluation of the most attractive alternatives.

g. Selection among the different alternatives[7].

Before deciding to litigate a litigant has to consider these elements. Still, circumstances may not permit a litigant to devote the time and resources required to

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[7] Alfred R., Oxenfeldt Cost-benefit Analysis for Executive Decision Making American Management Association. p.13, 1979.

perform each step, and he will be forced to pick out those on which to concentrate his attention. A consumer of legal services seeking to maximise his benefit and assumed to be rational must consider these ideal elements for benefit maximisation. In the operational place how far an average consumer of legal services in Kerala departs from these normative decision-making elements have been investigated and analysed with the help of primary data. Modeling the micro economic effect of litigation developed for the study serves as an intellectual tool for the analysis.

Though all decisions have some economic ingredient, litigants make two types of decisions that are fundamentally economic in character. The first type can be termed 'comprehensive' decisions. Comprehensive decisions require the litigant to select combinations of actions out of a huge number of possibilities and to determine how far to pursue each of them. The second type of decision can be termed 'single'. This decision is usually caused by an unexpected occurrence of a dispute. Here the litigant deals with a single decision.

The comprehensive and single decisions in litigations follow the economic goal of 'optimum allocation of resources'. It means that the decision maker or the litigant use the resources where he get the most economic benefit. The nature of resource allocation as well as the basic logic involved in approaching both comprehensive and single decision can be examined in an ideal theoretical plane. The decision-making behaviour of litigants in Kerala can be examined with the help of the theoretical classification such as Risk avertors, Risk neutrals and Risk takers. Resources are being used most efficiently when the excess of net benefit over cost is at a maximum. Efficient resource use requires a clear identification of economic goals, knowledge of what resources are available, and knowledge of how those resources can best be used to produce what is desired. In other words litigants seek maximum net economic benefit relative to economic cost.

The economic logic underlying comprehensive decisions are equimarginal principle and micro cost-benefit analysis. The equi-marginal principle can be applied to allocated resources of litigants efficiently. This principle

incorporates a ratonale that explains how to get maximum output from the use of any particular quantity of resources. The theory states that when marginal utilities have been equalised through the process of substitution one get maximum satisfaction. Though the present study pinpoints only the quantitatively measurable monetary benefits, the equi-marginal analysis helps to know the ideal theoretical method of decision-making of litigants. The essence of micro cost benefit analysis is that the 'worth' of any action, project, investment strategy equals the excess of the benefits it yields over the costs it entails. To pick out the best of the alternatives available, a litigant should estimate the net benefits to be obtained from each, and pick out the one offering the greatest net benefits.

The issues to be resolved in any litigation decision are as follows:-

1. What effects of the litigation should be included in its cost and what effects represent benefits ?

Benefits occur when one gains an objective: costs are occurred when on loses an objective

An informed litigant should include only economic costs and benefits that result from the decision to litigate.

2. How can a litigant deal with the uncertainty of the effects of each alternative action ?

The different outcomes from the alternative actions should be identified explicitly, in particular the amount of benefits and costs that might cause to the litigant.

3. How can a litigant value the effects of litigation especially in its intangible effects ?

The situation consists of getting a thorough understanding of the problem under investigation, and that requires the use of the model.

4. How can a litigant take into account the fact that the effect of litigation occur at different points of time?

This problem has a relatively simple solution: it is to state all effects at present values.

5. How can a litigant consider the costs involved for the mobilisation of the money for litigation expenses.

The costs involved for the collection of litigation expenses should be identified and it should reckoned in the total cost of litigation. While identifying the opportunity cost of the litigation, the litigant has to consider the important alternative, making an out of court settlement, and thus avoiding the trail. If he is making an out of court settlement he will be able to dispose his property, and the money obtained by selling the property can be invested in various profitable enterprises. If he is not considering this alternative he is missing the opportunity of making rational profit expectation from the property.

The objective of maximum net gain may be linked to the objective of optimum allocation of litigant's resources. If a litigant makes a decision that yields a maximum of net benefits, he will be using his resources efficiently. A litigant will find occasion to apply the equimarginal principle to litigation decision within the broad framework of micro cost-benefit analysis.

Constraints on the Litigant

A litigant chooses freely among all theoretically possible alternatives. The important limitations of the litigant related to the decision to litigate are the following:

1. Lack of financial resource to carry out the litigation.
2. Uncertainty involved in the decision.
3. Opportunity cost consideration of the litigation.
4. Delay involved in getting the decree.
5. Delay involved in executing the decree.

In spite of the above-mentioned limitations, a litigant must count the micro costs, and should be realistic about the probability of attaining net economic benefit.

OPPORTUNITY COST AND LITIGATION

The present study considers only those benefits which are quantifiable in terms of money. In order to evaluate benefits from an economic point of view, opportunity cost also should be estimated in total economic costs.

The concept of opportunity cost is one of the most central of all economic ideas. Opportunity cost has different applications but our goal to discuss opportunity cost in the computation of total cost of litigation. The concept of opportunity cost rests on the fact that to do certain things, one must forgo the opportunity to do other things. The limited resources of litigants prevent them from doing everything they wish to do. Their choice in any situation thus may force them to sacrifice something of value what they could gain by exploiting some alternative. Limited resources thus are the source of opportunity cost; litigants incur no opportunity cost when they possess unlimited resources. Opportunity cost arises only when litigants must forgo opportunities they would like to exploit. The managerial ability that a litigant may render for conducting the litigation may be of limited alternative but the money expended for the litigation have several alternatives. The total cost of litigation rendered by a litigant could have been invested elsewhere and the litigant should have earned a positive amount of money. The cost in these situation does not involve any actual outlay of funds or a reduction in the value of assets but rather the giving up of what the litigant

could have attained.

The concept of opportunity costs serve a litigant in two main ways. First, it helps to identify cost-creating actions and decisions that might otherwise be ignored. More specifically, it directs attention to certain costs that are not usually recognized, and are not recorded in the regular books of account. Second, it guides a litigant to the proper measurement of costs that are not accurately reported in the regular accounting records. Opportunity cost concept is thus valuable mainly because of the fact that accounting records either omitt certain costs or measure them inaccurately.

In the operational plane a litigant does not include in his accounting records valuation of things that he did not do-his forgone opportunities-and he is not in a position to obtain such accounts. But forgone opportunities should be properly valued for the estimation of real economic cost. Thus one cannot evaluate a decision to litigate simply by examining its economic benefit; one must consider the alternative actions that might have been taken instead. To apply the opportunity cost concept in this manner a litigant

is expected to turn up the most attractive, feasible alternatives and select the most attractive among them. The concept of opportunity cost does not explain how to search for attractive alternatives and does not help one decide when one has searched long enough for attractive alternatives. It does, however, require a litigant to be explicit about the alternatives that were considered and to place a value on them.

Apart from forgone opportunities, certain other costs sometimes are not recorded in litigant's regular books of account. These are the costs for the use of the litigant's time, the cost of the factors owned by litigant and employed in litigation. Often, the litigant conducting his own litigation is paid no salary. But the concept of he opportunity costs instructs, these people sometimes give up the opportunity to take gainful employment with others in order to serve their own litigation; what they could have earned then represents a cost of working for themselves. Similarly, if he spends money in his own litigation that would have been invested elsewhere to produce a return, he could also incur a cost. To ignore these costs is to exaggerate the economic benefit from the litigation.

When a litigant invest certain amount of money in his litigation, he usually ignores the benefits he would have realised from the things he would have done if he had not entered into the litigation. The concept of opportunity cost thus enjoys litigant to be practically alert for the 'hidden cost' of resources that are usually not associated with either money outlays or accounting cost.

The concept of opportunity cost stress that the true cost may not be of what the litigant has spent in his litigation or is currently paying, for the litigation. The true cost to the litigant is what he actually gave up, i.e., what he would have gained from putting that litigation cost to its next best use. Another aspect of opportunity cost is that the litigant should give explicit attention to the future alternatives he may give up by making a particular commitments in the present.

In short, the important concept of opportunity cost holds that any action forcloses other actions when one has limited resources. A wise decision-maker in litigation will

search cut alternatives consciously. He has to consider the following alternatives known to him.

1. Pick out the best of those alternatives known to him'
2. Include as costs the value of resources used to carry out a decision, eventhough no payments or accounting charges were made for them.
3. Value resources already possessed or employed by what they could produce for the litigant in alternative activities rather than by what they cost originally or are paid currently.
4. Identify and place a value on future opportunities whenever they are about to commit sizeable amounts of resources[8].

THE ECONOMIC BENEFITS FROM LITIGATION

To litigate means to carry on a legal contest by judicial process. Litigation costs represent only one side of litigation; the other side of it is benefits from litigation.

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[8] Alfred R., Oxenfeldt "Cost-benefit Analysis for Executive Decision Making" American Management Association. p.13, 1979.

Evaluation of benefits from litigation is a complex affair. Some benefits produced from litigation might be personal whereas others might be economic. Some benefits might be of a short-run character while other might have lasting implications. Personal benefits might be legal, and it might be non-monetary in character. Before evaluating benefits from litigations, one must be aware of the structure of benefits from litigation. In view of this multiplicity of dimensions, the solution adopted in this study is to divide the benefits from litigation into two categories: those benefits that are more or less quantifiable, and the others. The magnitude of the former could be assessed and the non-monetary aspects of benefits from litigation could not be assessed. The quantifiable benefit should have to be in terms of money. Since the study is confined to the economic evaluation of litigation, the non-quantifiable aspects of litigation benefits are disregarded.

Structure of Benefits from Litigation

For the purpose of analysis, the structure of benefits could be discussed as follows:

1. Decree from Courts

There will be direct economic benefit through decree obtained from courts. Decrees may be with costs or without costs. After the execution of decree, litigant might be in a position to enjoy economic benefits.

2. Capital appreciation

There are prospects of capital appreciation from private immovable property. The increasing trend in the value of private immovable property might be beneficial to litigants.

3. Invisible Economic Benefits

There might be occasions where economic benefits could be obtained to litigants from the proper enforcement of their civil rights. If the civil rights of litigants are enforced, they might be able to attain the mental make up for accruing prospective economic benefits.

4. Indirect Economic Benefits

If a decree is obtained in favour of a party, he could be able to enjoy future economic benefit from his property. The value of the property could be used for attaining economic benefits. For example, the property could be pledged for getting economic benefit.

5. Immediate Economic Benefit

If a party is reluctant towards litigation, the opposite party will correctly guess this position, and will try to exploit it. Prospective economic loss could be avoided from the decision taken for litigation.

An anatomy of litigation costs and benefits is useful for knowing the conceptual and computational aspects of litigation cost with special emphasis on opportunity cost. In the process of cost-benefit scrutinisation the hither to unrecognised economic costs can be realized. The depiction of the broad spectrum of benefit structure will also help to determine the net economic benefit from litigation. It is clear that a litigant must evaluate each alternative action for the attainment of maximisation of benefits.

CHAPTER VI

A COST-BENEFIT ANALYSIS OF LITIGATIONS

A micro economic evaluation of litigation is made in this chapter. This is done at two levels. First an assessment is made regarding the efficiency of administration of civil justice and second, the micro cost-benefit structure of litigations are assessed by bringing cost and benefit together for determining the net benefit from litigation.

In order to analyse the increasing trend in litigation costs, the following key questions were raised in the research problem:

1. Is cost of legal services excessive to litigants ?

2. If so, what are the real micro economic effect of litigation ?

3. To examine the nature of cost consciousness among litigants ?

The economic evaluation is done with the following well defined objectives.

1. To identify the major cost-raising factors in litigations.

2. To study the micro cost-benefit structure in litigations.

3. To examine the decision-making behaviour of litigants.

The Court Verdict Approach to the Problem

Two surveys were conducted for gathering data regarding litigation costs. The first was among litigants and the second was among advocates and judicial officers. The survey conducted among litigants disclosed the following facts.

1. Litigants had no proper cost consciousness before entering into the suit.

2. Litigants were under the impression that they could attain reasonable economic benefit from their suit.

3. Consumer of legal services should be backed by adequate purchasing power for entering into the legal service market.

4. Owing to the inordinate delay and excessive litigation costs, litigants had positive disadvantages for the enforcement of their civil rights.

The major responses of advocates on litigation costs are briefly listed as follows:-

1. Advocates in the four districts are well aware of inordinate delay in the disposal of the suit and the increasing cost for executing the decree.

2. Advocates by and large are not aware and bothered about the real micro cost-structure of litigations.

3. The majority of the advocates highlighted the need for revamping the existing alternative administrative provisions for the dispensation of justice to the poor.

4. Advocates generally admitted that there is positive correlation between cost incurring capacity of litigants and economic benefit from litigations.

Table: 6-1.

Advocate's View on the Existing Court Fee

Sl. No.	Particulars	No. of Advocates	Percentage
1.	Court fee should be reduced	100	50
2.	Abolished	70	35
3.	Reasonable	30	15
	Total	200	100

Source : Survey Data.

Table 6-1 shows the advocates' view on the Court fee. Out of 200 advocates 50% of them are holding the view that Court fee should be reduced and 35% recognized the need for abolishing court fees. Only 15% of the advocates consider the existing system of court fee as reasonable. This points to the need for re-organising the existing system of court fee.

Table : 6-2.

Cost Consideration of Advocates

Sl. No.	Particulars	No. of Advocates	Percentage
1.	Total benefit is greater than total cost	140	70
2.	Total benefit is equal to total cost	40	20
3.	Total benefit is less than total cost	20	10
	Total	200	100

Source : Survey Data.

Table 6-2 vividly illustrates the responses of

advocated on litigation cost. The majority of the advocates, i.e., 70% are of the view that litigation cost is reasonable and the cost structure rational. This leads to the fact that advocates are not considering the increasing trend in litigation cost.

Table : 6-3.

Advocates Views on Cost Incurring Capacity in Litigations

Sl. No.	Particulars	No. of Advocates	Percentage
1.	Positive relation of Cost and benefits	160	80
2.	Absence of cost and benefit relation	20	10
3.	Minimum relationship of cost and benefit	20	10
	Total	200	100

Source : Survey Data.

Table 6-3 reveals the fact that there is a direct relationship between economic factors and economic benefit

from litigations, because 80% of the advocates recognize this relationship between cost and benefit in litigation.

Table : 6-4.

Litigants Views on Court Fee

Sl. No.	Particulars	No. of Litigants	Percentage
1.	Court fee is reasonable	20	5
2.	Court fee is high	200	50
3.	Court fee should be abolished	180	45
	Total	400	100

Source : Survey Data.

The responses of litigants on Court fee are stated in the table 6-4 which shows that 50% litigants considers that the existing system of court fee as high and further 45% even states the need for abolition of court fee. Though the statutory provision of court fee is proportionate to the value of the suit, the empirical survey conducted among the

litigants revealed the fact that litigants are not aware of the nature of court fees before entering into their suits.

Table : 6-5.

Litigants View on Advocates Fee

Sl. No.	Particulars	No. of Litigants	Percentage
1.	Advocates fee is reasonable	20	5
2.	Advocates fee should be reduced	160	40
3.	Should be rationalised	220	55
	Total	400	100

Source : Survey Data.

Table 6-5 shows that fifty five per cent of litigants are for rationalising the existing system of advocate fee and 40% highlights the need for reducing advocate fee. It leads to the conclusion that there is considerable difference between the prescribed advocate fee and the actual advocate fee. It further shows that there should be a basic reorganisation of the nature and amount of advocate fee.

Table : 6-6.

Process Fees and Litigants

Sl. No.	Particulars	No. of Litigants	Percentage
1.	Process fee is reasonable	80	20
2.	High	200	50
3.	Very high	120	30
	Total	400	100

Source : Survey Data.

From Table 6-6 it is evident that 30% of the litigants finds it difficult to afford the existing system of process fee and 50% also feels that the existing process fee is not reasonable.

Table : 6-7.

Litigants Views on Other Costs

Sl. No.	Particulars	No. of Litigants	Percentage
1.	High	180	45
2.	Very high	160	40
3.	Reduced	60	15
	Total	400	100

Source : Survey Data.

Table 6-7 demonstrates the litigants view on other costs of litigations. Forty five percent of the litigants considers the other costs such as costs for commission, injunction, etc. are high and 40% of them considers as very high. Hence we can presume that the other litigation expenses rendered by litigants are not reasonable.

Table : 6-8.

Delay in the Disposal of Suits

Sl. No.	Particulars	No. of Litigants	Percentage
1.	Litigants obtained decree within five years	160	40
2.	Obtained decree after five years	240	60
	Total	400	100

Source : Survey Data.

From the table 6-8 it is evident that 40% of the litigants attained the decree within a period of five years. On the other hand 60% of the litigants spent above five years for attaining their decrees.

Table : 6-9.

Execution of Decree and Litigation Cost

Sl. No.	Particulars	No. of Litigants	Percentage
1.	Execution cost is Unreasonable	220	55
2.	Execution cost is excessive	180	45
	Total	400	100

Source : Survey Data.

Table 6-9 shows that the cost of execution of the decree is unreasonably high. Fifty five percent of the litigants stated that the existing provisions and procedural formalities for executing the decree are unreasonable and the remaining 45% also highlighted the excessive cost involved in executing a decree.

Emergence of criminal cases associated with execution of their decrees were cited by certain litigants.

In the process of administration of civil justice

advocates play a crucial role. Since litigants have legal as well as constitutional right of approaching the court for redressal of their grievances, it is through lawyers dispensation of civil justice is operationally manifested. Though advocates are aware of their professional duties and responsibilities, they are not in a position to contain the increasing trend of cost of legal services. The structural and procedural defects of the civil justice system is to a great extent responsible for increasing cost of legal services. The lawyers have a dynamic relation between the court and the litigant. Lawyers are to a great extent to serve the interest of their clients. as far as a lawyer is concerned, it is his duty to deliver justice to the best of his ability and knowledge.

In the process of playing the dynamic and committed intermediary role between the court and litigant, lawyers have a duty to see that justice is done even in economic terms. This is because of the fact that manifestation and enforcement of civil rights have monetary effects. As far as an informed litigant is concerned monitary gain is the main objective behind the decision to litigate. Owing to the inordinate

delay and other procedural factors, advocates find it difficult to realise the reasonable expectation of their clients.

Advocates rely heavily upon the fees as a main source of their income. Without legal monopoly of the right to provide and charge for such services, the legal profession would be less profitable. The survey conducted among litigants analysed the different aspects of advocate fees. This highlighted the fact that the litigants have to give advocate fee according to the expertise and experience of lawyers. The following are the different factors for the variation in advocate fee.

1. Complexity of the subject matter.
2. The skill, labour, specialised knowledge and responsibility involved on the part of advocate.
3. The number and importance of the documents prepared and presented.
4. The time expended by the advocate.
5. The amount or value of the property.
6. The importance of the matter to the client.

Economic Factors in Litigation

Economic factors play a major role in the fate of a litigation. The significance of economic factors in litigation are due to the following grounds.

1. The inability to incur heavy economic cost for litigation forces litigants to make an out of court settlement.

2. Inability of employing costly legal services for litigation results in failure of litigation

3. Litigants were sometimes forced to discontinue their suits owing to financial reasons.

4. There were cases where lost litigations were won on appeals after attaining economic power.

An examination of the cost structure of litigation shows that the following factors are important for high litigation costs.

1. Heavy cost for legal services.
2. Difficulties in the easy access to legal services.
3. The opportunity cost for litigation.
4. Unreasonable delay involved in the disposal of suits
5. Delay involved in executing the decree.

The present study explores the reasons for the accelerating trend in litigation costs and examines its cause and effect relationship. In order to find out answer to this basic research question, the present study examined the facts stated by litigants and lawyers. From cross-examination and comparative analysis of these opinion surveys, the following conclusions emerged.

1. The general perception of litigants toward litigation costs are true.
2. The responses of advocates towards litigation costs are also to be accepted.

Since the primary-level information presented by litigants are supported by adequate material evidence, there is reasonable ground to infer that the litigation costs in Kerala are heavy.

The major generalisation drawn from the analysis and interpretation of primary data leads to wide ramifications in the legal economic scenario of our society.

Empirical Verification of the Model

Since the tools and techniques existing in the economic analysis of law for analysing legal economic issues are inappropriate and insufficient for analysing the different aspects of the research problem, a Model has been developed. The three basic functions in the model such as Utility Function, Cost Function and Benefit Function could be empirically verified. Hence identification and estimation of the parameters relating to litigation costs could be possible.

The Classification of Litigants

For empirical analysis based on the decision making behaviour of litigants, litigants have been classified in the Model according to the following categories.

1. Risk Avertors
2. Risk Neutrals
3. Risk Takers

Cost-Benefit Positions of Litigation Scenarios

For the empirical investigation of the research problems the following cost-benefit positions could be used.

tb > tc.....(a)

tb = tc.....(b)

tb < tc.....(c)

In Position (a) i.e. tb>tc	In this position total benefit is greater than total cost and seeking justice in the private property litigation is desirable. The greater the difference between tb and to the greater will be the desirability.
In position (b) i.e tb=tc	In this position total benefit is Equal to total economic cost. Here the litigant is in no profit and no loss position, it means that the litigant is getting revenue equal to the total of accounting and opportunity cost and no more. The litigant has no net benefit from this position.
In position (c) i.e. tb<tc	Here total benefit is less than total cost and in such a situation seeking justice in the private property litigation is not desirable.

DISTRICT WISE ANALYSIS OF LITIGANTS

The survey was conducted in the four districts of Kerala. Private Immovable property litigations during the period between 1980 and 1990 have been selected for the study. The districts selected for the survey are Thiruvanathapuram, Kottayam Ernakulam and Malappuram. These four districts have been selected in order to give a proper geographical representation. Samples were selected from each district according to the total number of cases in each district. The sample group of the study is 400 informed litigants who have completed graduation and above 35 years of age.

1. Thiruvananthapuram District (Appendix II Fig. 1)

Table 6.10 shows the position of Risk Avertors, Risk Neutrals and Risk Takers in Thiruvananthapuram District.

Table : 6-10

Composition of Litigants in Thiruvananthapuram District

No. of Risk Avertors	Perce-ntage	No. of Risk Neutrals	Perce-ntage	No. of Risk-Takers	Perce-ntage	Total No.
10	11	40	44.5	40	44.5	90

Source : Survey Data.

From table 6.10 it is evident that out of 90 litigants 10 belong to Risk Avertors, 40, to Risk Neutrals and 40, to Risk Takers.

The major reasons for this composition are listed as follows:-

1. High degree of legal literacy and cost consciousness.
2. Absence of unreasonable difference in the financial status of Plaintiffs and defendants.
3. Absence of large scale inherited ownership in private property.

2.Kottayam District (Appendix III Fig.2)

Table : 6-11

Composition of Litigants in Kottayam District

No. of Risk Avertors	Perce-ntage	No. of Risk Neutrals	Perce-ntage	No. of Risk-Takers	Perce-ntage	Total No.
8	5	64	37	100	58	172

Source : Survey Data.

From table 6.11 it is evident that out of 172 litigants 8 belong to Risk Avertors, 64, to Risk Neutrals and 100, to Risk Takers.

The following reasons could be attributed to the above composition of litigants in Kottayam districts.

1 High level of cost incurring capacity among plaintiffs and defendants.

2. High level of ownership in inherited private immovable property.

3. Lower level of opportunity cost consideration among the litigants.
4. High degree of risk taking nature among the litigants.

3.Ernakulam District (Appendix IV Fig.3)

Table : 6-12

Composition of Litigants in Ernakulam District

No. of Risk Avertors	Perce-ntage	No. of Risk Neutrals	Perce-ntage	No. of Risk-Takers	Perce-ntage	Total No.
8	9	30	34	50	57	88

Source : Survey Data.

From table 6.12 it is clear that out of 88 litigants 8 belong to Risk Avertors, 30, to Risk Neutrals and 50, to Risk Takers.

The following are the main reasons for the above mentioned structure of litigants.

1. High level of literacy and cost consciousness among the litigants.
2. Higher access to legal services.
3. Absence of inherited private immovable property;

4.Malappuram District (Appendix V Fig.4)

Table : 6-13

Composition of Litigants in Malappuram District

No. of Risk Avertors	Perce-ntage	No. of Risk Neutrals	Perce-ntage	No. of Risk-Takers	Perce-ntage	Total No.
6	12	10	20	34	68	50

Source : Survey Data.

The table 6.13 reveals that out of 50 litigants 6 belong to Risk Avertors, 10, to Risk Neutrals and 34, to Risk Takers.

The following are the chief reasons for the above mentioned structure of litigants:-

1 Lower level of cost consciousness and legal literacy among the litigants.

2. Poor access to legal services and economic backwardness of litigants.

3. Considerable difference in the cost incurring capacity of plaintiffs and defendants.

4. Lower level of opportunity cost consciousness among litigants

Results of the District wise Analysis

Table : 6-14

Position of Litigants in the Four Districts

Sl.No.	Nature of Litigants	No.	%	Cost-Benefit Position
1.	Risk Averters	32	8	tb > tc
2.	Risk Neutrals	144	36	tb = tc
3.	Risk Takers	224	56	tb < tc
	Total	400	100	

Source : Survey Data.

Table 6.14 shows the result of the empirical study conducted in the four districts of Kerala. The result shows that 8% of litigants are aware of the excessive cost that may be incurred in litigation. Hence they are not interested in taking the risk involved in litigation. Thirty six percent of the litigants are in a neutral position. Fifty six per cent are holding the view that going for ltigation will be economically beneficial. The major reasons for this position are listed below.

1. Risk Averters are aware of the excessive cost in litigation.

2. Risk Neutrals are having reasonable profit expectation from litigations.

3. Risk Takers expect net economic benefit from litigation.

It is important to mention here that generally risk avertors are in tb >tc position, risk neutrals in tb=tc position and risk takers in tb<tc position.

Table : 6-15

Benefit Expectation of Litigants in the Civil Procedural Approach

R.A No.	%	Position	R.N No.	%	Position	R.T No.	%	Position
32	8	tb>tc	144	36	tb>tc	224	56	tb>tc

Source : Survey Data.

Table 6.15 indicates the benefit expectation of litigants in the Civil Procedural Approach. All the 400 litigants have positive benefit expectation from their litigation. Even if they are failing in their suits, they have the expectation of winning their suits through appeals. As per the Civil Procedural approach of litigation costs the litigants are not aware of the real cost structure.

Conclusion:

An average consumer of legal services in Kerala is not in a position to maximise his economic benefit or minimise

his economic cost in litigation. The two major reasons emerged from the district-wise analysis are listed below:-

1. Absence of proper cost consciousness among litigants.
2. Absence of awareness of the economic benefit from out of court settlement.

Cost Structure in Civil Procedure Approach

Table 6.16 portrays the nature of cost consciousness among litigants.

Table : 6-16

Real Cost Consciousness in Litigation

No. of non-informed litigants	%	No. of informed litigants	%	Total No.
360	90	40	10	400

Source : Survey Data.

From table 6.16 it is evident that only 10% of the litigants had pre-estimation about costs and benefits. In other words 90% of the litigants had no awareness regarding the prospective costs and benefits before entering into litigation. The following are the major reasons for the lack of cost consciousness.

1. Absence of legal literacy among the litigants.

2. Absence of proper cost benefit consideration.

3. Absence of knowledge regarding the prospective delay that may occur in litigations.

4. The common belief among the litigants that they could attain benefit from litigations.

The behaviour of litigants regarding the maintenance of accounts of litigation expenses could be explained with the help of table 6.17.

Table : 6-17

Maintenance of Accounts for Litigation Expenses

No. of litigants who maintain accounts	%	No. of litigants who do not maintain accounts	%	Total No.
60	15	340	85	400

Source : Survey Data.

From table 6.17 brings to light that 85% of the litigants had no habit of maintaining proper accounts of litigation cost. It leads to the benefit maximisation behaviour of consumers of legal services. From table 6.17 it is seen that only 15% of the litigants are having proper economic approach to litigation. The following two reasons can be attributed to this issue.

1. Absence of proper cost consciousness in litigation.

2. Absence of proper cost-benefit considerations of litigants.

Table : 6-18

Direct Cost in Litigation

No. of informed litigants	%	No. of non-informed litigants	%	Total No.
280	70	120	30	400

Source : Survey Data.

With the help of table 6.18 the nature of direct cost conceived by litigants could be explained. As per the Civil Procedural Approach to litigation cost, litigants are only aware of the different types of direct cost as included in section 195 of the Civil Rules of Practice in Kerala. The seventeen items of cost included in Section 195 of the Civil Rules of Practice in Kerala (Appendix I) show the structure of direct cost in litigation. However, the table shows that only 70% of the litigants are aware of the different types of direct cost. In other words the remaining 30% of the litigants are not even considering the direct money expenses in litigation.

The following two observations could be made in respect of the direct cost.

1. By and large litigants consider advocate fee and court fee as direct cost in litigation.

2. Though expenses related to injunction, commission and execution of decree are direct costs litigants do not estimate these costs as direct litigation expenses.

Indirect Cost

Table 6.19 could illustrate the nature of awareness of litigants in Indirect Cost.

Table : 6-19

Consciousness of Litigants in Indirect Cost

No. of informed litigants	%	No. of non-informed litigants	%	Total No.
32	8	368	92	400

Source : Survey Data.

From table 6.19 it is clear that only 8% are aware of the indirect cost. The remaining 92% are not aware of the indirect cost involved n litigation.

The following are the main reasons for the exclusion of indirect costs from the estimation of litigation cost.

1. Litigant by and large do not include travelling expenses and dearness allowances in litigation cost.

2. Wages or salary to the labours employed in litigation are also not included in litigation cost.

3. If the money is borrowed for litigation, the rate of interest of the money borrowed is not included in the litigation cost.

Hidden Cost

Table 6.20 illustrates the nature of awareness of litigants in hidden litigation cost.

Table : 6-20

Consciousness of Litigants in Hidden Cost

No. of informed litigants	%	No. of non-informed litigants	%	Total No.
12	3	388	97	400

Source : Survey Data.

Table 6.20 shows that only 3% of the litigants in aware of the hidden cost and 97% do not consider hidden cost in the estimation of litigation cost. The important reasons for this position are the following.

1. Financial loss due to the mental agony emerged from the suit is not counted by the litigant.

2. Financial loss due to the negative impact of the litigation on the occupation of the litigant is also not included by the litigant.

3. The private property disputes sometimes necessitate the circumstances for criminal offences, expenses incurred for the criminal cases are also not included by the litigant.

Opportunity Cost

With the help of table 6.21 cost consciousness of litigants in opportunity cost could be explained. Ninety two percent of litigants are not considering opportunity cost of litigation.

Table : 6-21

Cost Consciousness of Litigants in Opportunity Cost

No. of informed litigants	%	No. of non-informed litigants	%	Total No.
32	8	368	92	400

Source : Survey Data.

The important reason for the exclusion of opportunity cost are listed below:

1. The normal alternative return from the money capital invested in the litigation are not usually counted by the litigant.

2. The earnings that would have obtained by the alternative employment of litigants' managerial ability are also not included by litigants.

3. The normal returns that would have been obtained from the disputed property are also not estimated.

4. The reasonable returns on the money capital borrowed for litigation,/if invested out side are also not included in the litigation cost.

5. Litigants are not usually considering the difference between the real interest rate and the interest rate fixed by the court .

6. The money rewards for the factors owned by the litigant and employed in the litigation, including the time are not considered by the litigant for the computation of litigation cost.

In the Civil Procedural Approach to the litigation cost, litigants are only considering the direct cost. The litigants are not aware of and do not bother about the indirect cost, hidden cost, and opportunity cost incurred in litigation due to the following factors.

1. Inherent defects in the Civil Procedural System.

2. Excessive importance given to the formal legalistic process, instead of net economic benefit.

Classification of Litigations

The litigations analysed in the survey could be classified in the following ways.

1. Litigations above five lakhs and below five lakhs
2. Litigations from Rural and Urban areas.

1. Litigation above five lakhs and below five lakhs

An economic criterion used in the survey was litigations above five lakhs and below five lakhs. As shown in table 6.22, 20% of the litigations were above five lakhs and 80%, below five lakhs.

Table : 6-22

Economic Classification of Litigation

Litigations above Five lakhs (No.)	Perce-ntage	Litigations below Five lakhs (No.)	Perce-ntage	Total No.
80	20	320	80	400

Source : Survey Data.

II. Litigations from Rural and Urban areas

Table :6-23

Rural-Urban Classification of Litigants

Litigations from Rural areas (No.)	Percentage	Litigations from Urban areas (No.)	Percentage	Total No.
120	30	280	70	400

Source : Survey Data.

Table 6.23 shows that 30% of the litigations were from rural areas and the remaining 70% from urban areas. The litigants from rural areas had comparatively higher cost burden than urban areas.

The major reasons for the increasing trend of litigation costs in the rural areas are the following:-

1. Access to legal services
2. Absence of legal literacy
3. Economic backwardness of litigants.

Litigations above Five Lakhs

Table 6.24 shows the economically beneficial positions of a litigant whose property is above five lakhs.

Table : 6-24

Value of the Disputed Property	Total costs Incurred	Period taken for Disposal	Nature of the Decree Obtained
6,00,000/-	90,000/-	4 years	Awarded the property with costs

Source : Survey Data.

Since the plaintiff being economically well off, he had adequate cost incurring capacity. On the other hand the defendant had a comparatively weaker economic position, hence the former could succeed in the litigation.

In this context it is significant to mention the fact that 20% of litigants whose property worth above five lakhs enjoyed economic benefit from their suits.

Economic Benefits and Cost Incurring Capacity of Litigants

The enquiry revealed that there is a positive relationship between cost incurring capacity of litigants and economic benefits from litigations. The responses of litigants towards the relationship between cost and benefit could be illustrated with the help of table 6.25.

Table : 6-25

Relationship between Costs and Benefits

Relationship between costs and benefits (No.of Litigants)	%	No Relationship between costs and benefits (No.of Litigants)	%	Total
360	90	40	10	400

Source : Survey Data.

Out of 400 litigants 90% stated the positive relationship between the cost incurring capacity of litigants and the economic benefits there from. The major reasons for the significance of economic factors in litigation are the following.

1. Litigants discontinued their suits owing to financial reasons.
2. Litigants failed in their suits owing to the inability in incurring heavy cost.
3. Litigants did not receive the services of well qualified and well experienced advocated owing to the heavy advocate's fee.
4. Litigants could not go for appeals owing to the heavy litigation cost.
5. Litigants were forced to enter into out of court settlements incurring heavy financial loss considering the prospective heavy cost that they may incur in the litigation.

THE ECONOMIC BENEFIT FROM LITIGATIONS

Litigation costs represent only one side of the litigation, the other side of it is the benefits from the litigation. In order to evaluate the benefits from litigations, only economically quantifiable benefits are considered. The structure of benefits from litigations are discussed below.

1. Economic Benefits from the Decree

After obtaining and executing the decree from courts, litigants might be in a position to enjoy economic benefits. This is because of the fact that the money spent on court related activities might be lower than the economic benefit obtained from the decree.

Table 6.26 shows the position of litigants regarding economic benefits from their decrees.

Table : 6-26

Economic Benefits from Decrees

Economic Benefit from the Decree (No.of Litigants)	%	No Economic Benefit from the Decree (No.of Litigants)	%	Total
80	20	320	80	400

Source : Survey Data.

From table 6.26 it is evident that only 20% of litigants were able to attain economic benefits from their decrees while 80% of litigants did not enjoy any economic benefits at all.

2. Capital Appreciation from the Disputed Property

Litigants sometimes enjoy economic benefits through the capital appreciation of their disputed property. The boom trend existing in the private immovable property market might be beneficial to the concerned litigant. Table 6.27 shows the position of these litigants who enjoyed economic benefits from capital appreciation.

Table : 6-27

Capital Appreciation from the Disputed Property

No. of Litigants who obtained Capital Appreciation	%	No Capital Appreciation	%	Total
120	30	280	70	400

Source : Survey Data.

Table 6.27 shows that only 30% of litigants enjoyed economic benefits from the capital appreciation of their disputed property. Twenty percent of percentage litigants could not enjoy such benefits.

3. Hidden Economic Benefits

Litigants sometimes enjoy hidden economic benefits from the proper enforcements of their civil rights. The position of litigants regarding hidden economic benefits could be explained with the help of table 6.28.

Table : 6-28

Hidden Economic Benefits

Hidden Economic Benefit (No.of Litigants)	%	No Hidden Economic Benefit (No.of Litigants)	%	Total
60	15	340	85	400

Source : Survey Data.

Table 6.28 shows that only 15% of the litigants enjoyed hidden economic benefits from the enforcement of their civil rights while 85% of the litigants did not enjoy any economic benefits.

4. Indirect Economic Benefits

When a party has executed his decree, he might be in a position to enjoy indirect economic benefit from the property. The nature of indirect benefits from litigation could be explained with the help of table 6.29.

Table : 6-29

Indirect Economic Benefits

Indirect Economic Benefit (No.of Litigants)	%	No Indirect Economic Benefit (No.of Litigants)	%	Total
160	40	240	60	400

Source : Survey Data.

Table 6.29 shows that 40% of the litigants enjoyed indirect economic benefits from their suits while 60% of the litigants had no such benefits.

5. Immediate Economic Benefit

If a party is deliberately avoiding the need for litigation, his opposite party may guess his position and will try to exploit it. Therefore he will take a decision to litigate for avoiding the future economic loss. Table 6.30 illustrates the position of litigants relating to immediate economic benefits.

Table : 6-30

Immediate Economic Benefits

Immediate Economic Benefit (No.of Litigants)	%	No Immediate Economic Benefit (No.of Litigants)	%	Total
120	30	280	70	400

Source : Survey Data.

Table 6.30 shows that 30% of the litigants obtained immediate economic benefit from their decisions to litigate. Seventy per cent of the litigants did not derive any immediate economic benefits.

The study has exposed the different components of cost-structure and the major cost raising factors such as Court Fee, Process fee, Fee for Execution and Delay in the disposal of suits etc. The different components of the benefit-structure is also explained. When we bring together both cost and benefits, we could see that the litigants are not in a position to enjoy the expected net economic benefit from their litigations. Moreover, the litigants are not always enjoying the different sources of economic benefits. On the other hand they are not considering the real cost-structure of litigations.

Absence of proper cost consciousness is the major reason for the heavy cost of litigation in Kerala. In our country education in general and legal education in particular are not effectively creating the awareness for administration

of civil justice at the minimum cost. The influence of middlemen for operating the suit are more prevalent upon comparatively lesser enlightened litigants, especially litigants from the rural areas.

In order to determine the net economic benefit from litigations, a comparative study between civil procedural approach to litigation costs and economic approach to litigation are necessary.

The Academic Lawyer's Approach and the Economist's Approach to Litigation Cost

The identification of the major cost-raising factors in litigations could not explore the basic reason behind the accelerating trend in litigation cost. Hence there arises the necessity of viewing the increasing trend in litigation cost from an economist's view point.

According to the Civil Procedure Approach to litigation cost, a litigant is only estimating the direct cost of the litigation. But an economist's approach to litigation

cost is different from an academic lawyers approach to litigation cost. An economist will include the true costs of litigation

Table : 6-31

Litigation Cost of Risk Neutral in an Academic Lawyer's Approach

Value of the Disputed Property	Year of filing suit	Year of Disposal of the suit	Period for the disposal	Total Cost	Nature of disposal of the suit
Rs.65,000/-	1980	1984	4 years	9,000/-	Suit dismissed with cost of Rs.7500

Source : Survey Data.

A Risk Neutral litigant's cost position in the Academic Lawyer's approach is illustrated in Table 6.31. Mr. N, a Risk Neutral, is expecting fair prospects from litigation. He entered into a suit on property worth Rs. 65,000/-. He rendered the direct cost worth Rs. 9000/-.

However the decision was in favour of his opposite party. As per the decision he had to remit Rs. 7,500/- as litigation expenses to his opposite party. Here he incurred the litigation cost worth Rs. 16,500/-. Since Mr. 'N' being a Risk Neutral, he did not make any attempt for further appeal.

Table : 6-32

Litigation Cost of Risk Taker in an Academic Lawyer's Approach

Stages	Value of Dispute Property	Year of filing suit	Year of Disposal of suit	Period	Total Cost	Nature of disposal of the suit
First	Rs. 80,000/-	1980	1984	4 years	Rs.7500/-	Dismissed the suit
Second (appeal)	Rs. 80,000/-	1984	1988	4 years	Rs.10000 -------- Rs.17500	Awarded Rs.50000 including cost

Source : Survey Data.

Table 6.32 indicates the litigation cost position of a Risk Taker 'T' in an Academic Lawyer's Approach. Mr. T, being a Risk Taker expected maximum economic benefit from his

suit. He rendered a direct cost of Rs. 7,500/-. He did not succeed in the suit. Being a gain seeker, he went for an appeal. For the appeal suit, he rendered Rs. 10,000/-. He obtained a decree in his favour worth Rs. 50,000/- only. In this litigation he had a total cost of Rs. 17,500/- and he was able to attain economic benefit of Rs. 32,500/- even after eight years of litigation.

Table : 6-33

The Economist's approach to Litigation Cost of a Risk Neutral

Value of disputed property	Direct cost	Indirect cost	Hidden cost	Total cost	Period	Nature of disposal of the suit
Rs. 65,000/-	Rs. 6900/-	Rs. 5050/-	Rs. 2650 add cost paid as per decision	Rs. 14,600/- Rs.7500 ------- Grant total Rs.22100	4yrs.	Dismissed with cost of suit

Source : Survey Data.

Table 6.33 shows a Risk Neutral's Cost Position from aneconomist's angle. In the Academic Lawyers Approach, his litigation cost was only Rs. 9,000/-. But when the litigation cost was analysed from an economist's point of view the real cost structure altered. He gave Rs. 5050 indirect cost, and Rs. 2650 as hidden cost. Thus he had a total cost of Rs. 14,600/-. In addition to this he was forced to pay Rs. 7,500/- to his opposite party as the litigation cost.

Table : 6-34

The Economist's Approach to Litigation Cost of a Risk Taker

Value of disputed property	Direct cost	Indirect cost	Hidden cost	Total cost	Period	Nature of disposal of the suit
Rs. 80,000/-	Rs. 14,100/-	Rs. 7,900/-	Rs. 5,000/-	Rs. 27,000/-	8 yrs	Awarded Rs.50,000 with cost

Source : Survey Data.

Table 6.34 depicts economist's approach to litigation cost of a Risk Taker. When the Risk Taker had undergone an economist's evaluation his concept of cost

changed and he included indirect and hidden costs in the estimation of total cost. In addition to the direct cost of Rs. 14,100/- he rendered Rs. 7,900/- as indirect cost and Rs. 5000/- as hidden cost. Thus he had a total cost of Rs. 27,000/-. Even after eight years of litigation he was able to get only Rs. 50,000/-.

Table : 6-35

Opportunity Cost Approach to Litigation

Value of the disputed property	Sacrificed Amount	Settled Amount	Period
Rs.85,000/-	Rs.15,000/-	Rs.70,000	1 month

Source : Survey Data.

Table : 6- 36

Investment Pattern of a Risk Averter

Investment in Real Estate	Investment in Financial Institutions	Period of investment	Profit from Real Estate	Profit from financial savings	Total net profit
Rs. 55,000/-	Rs. 15,000/-	4 years	Rs. 1,01,000/-	Rs. 12,000/-	Rs. 1,28,000

Source : Survey Data.

Table 6.36 indicates the investment pattern of a Risk Averter. A Risk Averter by nature is interested to settle a dispute by an out of Court Settlement. He is aware of the opportunity cost of litigation. Mr. A, a Risk Averter settled his property dispute worth Rs.85,000/- by sacrificing Rs.15,000/-. With the settled amount of Rs.70,000/- he was able to attain a net benefit of Rs.1,28,000/- within a period of four years as shown in the table.

Impact of Cost-Consciousness

Proper cost consciousness has a significant impact upon the decision-making behaviour of litigants. Figures 1 to 4 in appendix 1 to 4 illustrate the district-wise position of litigants. Changes in the position of Risk Averters, Risk Neutral and Risk Takers in the district-wise are also shown in these figures.

Natural application of economic theory and empirical facts are to be taken into consideration for the economic evaluation of litigations. The three major issues raised in

the study are 1. To identify the major cost raising factors in litigations 2. To study the micro cost benefit structure of private immovable property litigations and 3. To examine the nature of cost consciousness among litigants. While analysing the basic issues related to these three objectives we could see that absence of awareness of real cost-structure in litigation is the major reason for increasing trend in litigation costs. This is because of the fact that litigants expect a reasonable economic benefit before entering into litigations.

Article 39 A of the constitution of India seeks to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. However, the two level empirical enquiry conducted among litigants and lawyers lead to a valid conclusion that the litigation costs are high compared with the net economic benefit from it. It is clear that certain major cost raising factors are operating there in.

By observing the decision-making behaviour of the four hundred litigants in the four districts of Kerala, three

different groups were classified. They are 1. Risk Averters 2. Risk Neutrals and 3. Risk Takers. Prima facie 8% belongs to Risk Averters, 36%, to Risk Neutrals and 56% to Risk Takers(Appendix VI (a) Fig.5). The Academic Lawyer's Approach to litigation costs consider only the direct litigation costs.

From an Economist's vision the benefit from a litigation should be manifested in quantitative monetary terms. In order to estimate the net economic benefit from litigation, the real cost-structure is to be determined. After having proper cost-consciousness i.e., by getting awareness of the different components of the real cost-structure, the decision-making behaviour of litigants as per the Game Theory Approach made a significant change. The percentage of Risk Averter increased from 8 to 53. Risk Neutrals have been reduced from 36 to 27 and Risk Takers also have been reduced from 56% to 20% (Appendix VI (b) Fig.6).

A rational consumer of legal services will always try to maximise his benefit. But an average litigant in Kerala is only considering the existing Civil Procedural Approach to litigation cost. In this approach the real

cost-structure is not properly realised. However, an economist's approach to litigation cost will expose the true cost-structure involved in litigation.

Need for Improvement in the Civil Justice System

The evaluation of administration of civil justice revealed the necessity for improvement in the functioning of the civil justice system. The results of the empirical study also substantiated the need for reduction in litigation costs. Both litigants as well as legal professionals stated the necessity for qualitative change in the administration of civil justice.

1. Revamping the Cost-Structure

Table 6.37 illustrates the reactions of litigants for reducing litigation costs.

Table : 6-37

Revamping the Existing Cost-Structure

Sl.No.	Particulars	No. of Litigants	%	Total No. of Respondents
1.	The cost structure to be revamped	320	80	
2.	Favouring the existing system	80	20	
			100	400

Source : Survey Data.

It is evident from table 6.37 that 80% of litigants asked for revamping the existing cost-structure in litigations. The important reasons expressed by litigants for change in the cost structure are the following.

1. Actual costs of litigants are higher than the expected cost.
2. Actual benefits of litigants are lower than the expected benefits
3. When well-informed litigants realised their real cost structure of litigations.

While analysing the responses of advocates, it is important to mention that 30% of them is in favour of revamping the existing cost structure.

2. Simplification of Civil Proceedings

The respondents in the survey stressed the need for simplifying the existing civil procedural formalities. The responses of litigants towards simplification of civil proceedings could be illustrated from table 6.38

Table : 6-38

Simplification of Civil Proceedings

Sl.No.	Particulars	No.	%
1.	Favouring the existing system	80	20
2.	Simplifying the Civil proceedings	320	80
	Total	400	100

Source : Survey Data.

The major reasons for the simplification of civil procedural formalities are listed below.

1. Litigants find it difficult to follow the existing civil proceedings.
2. The use of the English language in court proceedings obstructs an ordinary litigant from knowing the real litigation process.

The need for simplification of civil proceedings is highlighted by advocates too. Thirty five percentage of the advocates are in favour of simplifying the existing civil proceedings.

3. Alternative Grievance Redressal Forums

The responses of litigants regarding the functioning of the existing alternative grievance redressal forums such as Neethimela, Legal Aid to the Poor etc. show that these alternative provisions are not successful in achieving the desired social objectives. The table 6.39 illustrates the responses of litigants.

Table : 6-39

Functioning of Alternative Provisions

Sl.No.	Particulars	No.	%
1.	Successful functioning	20	5
2.	Unsuccessful	380	95
	Total	400	100

Source : Survey Data.

The major reasons for the unsuccessful functioning of these alternatives are the following:

1. Difficulty in obtaining the services from these alternative administrative machineries.
2. Litigants are not properly aware of the social objectives of these alternative aids or methods.

Sixty five per cent of legal professionals also stated the drawbacks regarding the functioning of these alternatives

4. Establishment of Additional courts

Table : 6-40

Establishment of Additional Courts at the Village Level

Sl.No.	Particulars	No.	%
1.	Need for additional courts	320	80
2.	Favouring the existing system	80	20
	Total	400	100

Source : Survey Data.

The Table 6.40 shows that 80% of litigants are in favour of establishing additional courts at the village level. The main purpose behind proposing this suggestion is to reduce the unnecessary litigation expenses.

In this context it is important to state that 60% of legal professionals are also supporting the need for establishing additional courts at the village level

5. Insurance Schemes for Litigations

Table : 6-41

Insurance for Litigations

Sl.No.	Particulars	No.	%
1.	Favouring the existing system	120	30
2.	Insurance for litigations	280	70
	Total	400	100

Source : Survey Data.

From table 6.41 it is evident that 70% of litigants realised the necessity for constituting insurance shemes for litigations.

Eighty per cent of advocates also highlighted the necessity for the establishment of insurance schemes for litigations.

6. Time Bound Decisions

Table : 6-42

Nature of Decision

Sl.No.	Particulars	No.	%
1.	Time bound decision	340	85
2.	Favouring the existing system	60	15
	Total	400	100

Source : Survey Data.

Table 6.42 illustrates the need for time bound decision in litigations. Eighty five per cent of litigants stated the need for time bound decision in litigations.

It is important to note here that 50% of legal professionals also suggested the necessity of time bound decision in litigations.

7. Specialised Courts

The table 6.43 shows the need for establishing specialised courts in the private property litigations.

Table : 6–43

Specialised Courts for Litigations

Sl.No.	Particulars	No.	%
1.	Specialised Courts	280	70
2.	Favouring the existing system	120	30
	Total	400	100

Source : Survey Data.

It is evident from table 6.43 that 70% of litigants realised the convenience of specialised courts for dealing with the private property litigations.

It is important to note that 55% of advocates also expressed the need for establishing specialised courts for litigations.

8. Courts for Conciliation

Table : 6–44

Forum for Out of Court Settlements

Sl.No.	Particulars	No.	%
1.	Forum for out of court settlements	240	60
2.	Favouring the existing system	160	40
	Total	400	100

Source : Survey Data.

Table 6.44 reveals that 60% of litigants are in favour of establishing conciliation courts for out of court settlements. Litigants realised the significance of out of

court settlements due to the following reasons.

1. Out of court settlements avoid unnecessary delays involved in the disposal of suits.
2. Excessive cost burden could be avoided by out of court settlements.
3 Out of court settlements avoid the troubles involved in the litigation process.

The responses of advocates on this issue is also significant. Twenty five percent of legal professionals stated the relevance for establishing courts for reconciliation.

The study on the micro cost-benefit structure of litigations exposed the lack of awareness among litigants regarding litigation costs. The majority of litigants enter into litigations in view of the expected economic benefits. But they could not realize the expected economic benefit. The economic evaluation of litigation will make significant change in the decision-making behaviour of litigants. The economist's approach to litigation will facilitate litigants

to understand the real litigation costs. Therefore, there arises the necessity of viewing the effect of civil justice from the economists point of view.

CHAPTER VII

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

Chapter one to six have fully discussed the Economics of the Private Immovable Property Litigations in Kerala. For making a resume of the study the major themes of the problem can be summarised as follows.

The first chapter gives an introduction to the subject of study. It defines the problem, objectives and methodology. The basic research issues of the study are based on the structural premises of chapter one.

Chapter two makes a brief review of the literature in Legal-Economics in which the problem under investigation is involved. The application of economic approach to legal issues is based on the analysis made by a group of economists, already referred to, is based on the theory of choice. The basic ideas in this approach are maximising behaviour, stable preferences and opportunity cost. The literature survey made in chapter two reveals that economic analysis can be used to

explain the functioning of any legal system. The major principles in the economic analysis of law and its empirical relevance are analysed in this chapter.

Chapter three presents the theoretical issues in justice and discusses the history as well as the nature of civil justice administration in India. The doctrinal legal-economic issues embodied in the concept of property are discussed here. The historical enquiry regarding the administration of the civil justice system in India reveals that India's present system of civil justice administration has no link with the Hindu and Muslim periods in Indian history. The collapse of the Mughal Empire facilitated the English Traders to establish their own legal machinery in India. The civil justice administration existing at present in India is based on the English legal system established by the British rule, instead of the Indian legal system already existed in our country.

Chapter four deals with the theoretical framework for analysing the micro economics of litigations. It discusses certain most-widely used methods for calculating

aggregate gains and losses in legal-economic issues and presents the Model developed for the study. Since the traditional tools of economic theory are not effective in analysing the litigant's behaviour under uncertainty, the Theory of Game is used as an analytical apparatus to examine and analyse the decision-making behaviour of litigants under conditions of uncertainty. This naturally leads to the formulation of the Model to investigate the various aspects of the increasing trend in litigation cost and to study the decision-making behaviour of litigants. With the help of the Model the different aspects of the problem have been identified and suggestions and recommendations are made for improving the present system of civil justice administration.

Chapter five lays out the conceptual and computational aspects of the cost-benefit structure of litigations with special emphasis on opportunity cost. This chapter discusses the normative aspects of decision-making behaviour of litigants. For evaluating the net benefit in litigation, cost should be reckoned in real terms rather than in money terms. In order to estimate the real cost of litigation one should include the direct, indirect, hidden,

and opportunity cost of litigation. Resources of a litigant are being used most efficiently when the benefits over costs is at a maximum. To make a rational choice, the litigant should evaluate each alternative actions and determine what it will contribute towards the attainment of the objective of maximisation of benefit. The cost of a litigation will be the loss of money, time and energy that the litigant could otherwise have used in some other productive pursuits or in other investments open to him. The concept of opportunity cost helps a litigant mainly in two ways. First, it helps to identify cost-creating actions and decisions that might otherwise be ignored. Second, it helps a litigant in the proper measurement of the cost that is not accurately reported in the regular accounting records.

Chapter six focuses on a cost-benefit analysis of litigations. The economic evaluation of litigation is done empirically at two levels. First, an evaluation of civil justice administration is made where the cost-raising factors in litigation are highlighted. Secondly, both costs and benefits are brought together for determining the net benefit from litigations. While assessing the cost-benefit structure

in litigations, the process of determining the net benefit from litigation is brought to light.

In the perceptive of an academic lawyer, going for a litigation may be beneficial. A litigant may also think in that line because both are guided by plain common sense regarding cost and benefit in litigation. But an economist based on economic evaluation of the cost benefit ration will advise for an out of court settlement for getting an economic benefit from a dispute. Economic reasoning helps why and when a decision regarding a litigation is worthwhile. Economic evaluation tells us that nothing is free from society's point of view. The decision to litigate for example, consumes economic resources that will then be unavailable for other uses and the economic approach can assist in determining the real value of money. The money and time which a litigant spends on court-related activities could be used in various productive ways. The use of economic resources in suits are desirable only when the benefit from the litigation exceeds the cost. If cost exceeds benefit it is unwise on the part of the litigant to use economic resources in the course of legal proceedings. But litigants at present have only a legal

approach to civil justice. A consumer of legal services should seek to maximise his economic benefit and have an economic approach to civil justice.

To give a proper basis and orientation to the evaluation of the cost-benefit ratio in litigations, the decision-making behaviour of the three groups of litigants, viz. Risk Averters, Risk Neutrals and Risk Takers, have been empirically verified. According to the empirical enquiry 8 per cent of litigants belongs to Risk Averters and 36 per cent to Risk Neutrals and 56 per cent to Risk Takers. Risk Averters believe that if they enter into litigation their position would be tb > tc. Since they averted the need for litigation they could attain tc > tc status. It is interesting to note that after attaining proper cost-consciousness the percentage of Risk Averters has increased from 8 per cent to 53 per cent. Risk Neutrals before entering into litigation expect tb >tc position. But the result of the empirical study shows that their expectations are not absolutely true. After realising real cost-position, the percentage of Risk Neutrals were reduced from 36 per cent to 27 per cent. Risk Takers before entering

into suits have a tb >tc expectation. But the results of the empirical study reveal that the majority of the Risk Takers ended up with the tb < tc position. Thus Risk Takers have been reduced from 56 per cent to 20 per cent.

Major findings of the Study

The major findings emerged from the study may be presented as given below.

The historical investigation made in chapter three regarding the nature of civil justice administration in India, reveals that the civil justice system in India is basically modelled on the English legal system introduced by the British in place of the legal system that was in vogue in India. The system at present is not in a position to furnish justice at the minimum cost.

Article 39-A as per the Amendment of 1976 to the constitution of India seeks to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. But the empirical enquiry

shows that this principle enshrined in the Constitution has not been realised in private immovable property litigations.

Based on the secondary information which is discussed in chapter three, it can be presumed that inordinate delay in the disposal of suits is the major reason for the accelerating trend in litigation costs. It also shows that the existing alternative provisions for the fair administration of civil justice viz. Neethimela, Schemes for Legal Aid the Poor etc. have not fully succeeded in reducing the cost of legal services.

The analysis of primary data, made on the basis of the anatomy of litigation costs and benefits explained in chapter five reveals that those litigants who succeeded in their suits get very little economic benefits and sometimes no economic benefits at all when opportunity costs involved in the conduct of the suits are taken into consideration. It further shows that to a great extent, out of court settlements are more economically beneficial than going for litigation.

The cost-benefit analysis of litigations made in chapter six, based on the primary data, leads to the following findings.

1. As far as an average litigant in Kerala is concerned, the existing system of court fee is not affordable.

2. The actual advocate's fee is higher than the prescribed fee.

3. Economic benefit in litigation is to a considerable extent dependent upon the economic position of the litigant.

4. The cost of the private immovable property litigations in Kerala is high compared with the expected and realised-economic benefit.

5. In litigations involving more than Rupees five lakhs irrespective of the incurrence of heavy cost, decree holders are in a position to attain economic benefit from them.

6. A litigant has to incur a heavy cost for the execution of the decree.

7. Proper cost-consciousness has a significant impact on the decision-making behaviour of litigants.

As per the empirical verification of the Model presented in chapter four the following findings have emerged.

1. Though a consumer of legal services is rational, he finds it difficult to maximise the economic benefit from his litigation.

2. Litigants generally fail to comprehend the real cost of litigation before entering into their suits.

RECOMMENDATIONS

On the basis of the study, the following recommendations are made for improving the present system of civil justice administration with special focus on reducing the litigation cost in Kerala.

1. The disposal of private immovable property litigations should be made time bound.

2. Permanent administrative machinery for out of court settlements, consisting of lawyers and prominent public men, is to be established from the grass root level. The disputes relating to private property should be referred to from the very beginning to this machinery.

3. The existing system of Court Fee should be restructured.

4. The State should take appropriate steps for inculcating legal literacy among citizens and simplifying the Civil Procedure Code.

5. Most Modern management techniques are to be employed in the administration of civil justice. Example, installation of computers etc.

6. There should be appropriate judicial provision and procedural formalities for minimising the cost and time involved in the execution of the decree.

7. Provision of Insurance is to be provided for litigations. Just like the functioning of any other insurance scheme, citizens should be provided with the facility for insuring their prospective litigations.

8. It is desirable to constitute a high level judicial committee, consisting of legal economists, for studying the increasing trend in the cost of legal services in Kerala and to evaluate the functioning of the existing provisions for ensuring legal aid to the poor. (The committee should also propose recommendations to minimise cost of litigations.)

9. In order to avoid prospective litigations, every economic transaction should be free from future prospects of litigations. Documentation should be made by qualified legal professionals and legislation should be initiated for professional accountability.

It may be possible to develop macro-dynamic operational model for analysing the macro legal-economic scenario of our society.

The present study makes a close look at the economic rationale of private immovable property litigations in Kerala. The analysis of civil justice in India and evaluation of micro costs and benefits of litigations, based on the Model, reveals the significance of an Economist's Approach to legal services. The existing cost-structure and the conventional decision-making behaviour of litigants account for the accelerating trend in litigation costs. This suggests the need for rational decision-making behaviour of litigants. The empirical study done, by considering the opportunity cost of litigation and the major issues emerging from the economic evaluation of net benefits in litigations, highlights the fact that the existing Civil Procedural Approach to litigation does not exactly determine the economic cost of litigation; only an Economist's Approach to litigation could determine the 'Economics of Justice in Kerala'.

APPENDICES

APPENDIX - I

TABULATION OF COSTS IN CIVIL SUITS

Tabulation of costs as per Section 195 of the Civil Rules of Practice in Kerala are given as follows:-

i) the court fee levied and paid as institution fee, stamp on vakalaths and petitions and process fee of every description;

ii) cost of production or inspection of records and search fee;

iii) expenses of postage, money order charge, allowance and batta to witnesses;

iv) cost of preparation of certified copies and court fee affixed there on;

v) cost of making copies of pleadings, applications or affidavits, memoranda of appeals or cross-objections at the rate of * 50 paise per page of type written or printed matter and * 30 paise in the case of manuscript;

vi) cost of preparation of processes at the rate of 12 paise for each original process and 3 paise for each duplicate process subject to a minimum of 25 paise in each suit;

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* The figures '50' and '30' were substituted for '25' and '15' respectively as per notification No.D1-15636/76 dt.15-378, published in K.G.No.19, dated 9-5-79.

vii) costs of encumbrance certificate and the search fee paid therefor;

viii) cost of certified copies of documents obtained from the office of a Sub Registrar or any other Public officer as evidenced from the receipt relating there to and the cost of the stamp papers required therefor;

ix) pleader's fee as allowed by the rules;

x) penalty, if any, levied on unstamped documents, if so directed by the Court.

xi) cost of translation of documents as may be allowed by the courts;

xii) expenses of commissions including the fees paid to commissioners;

xiii) cost of sale or detention of property as allowed by the court;

xiv) charges for printing of records required to be printed under rules;

xv) charges incurred for publication of notices etc. in news paper and the Gazette;

xvii) every other charges or expense which in the opinion of the Court has been properly incurred or met for the conduct of the case.

-oOo-

APPENDIX II

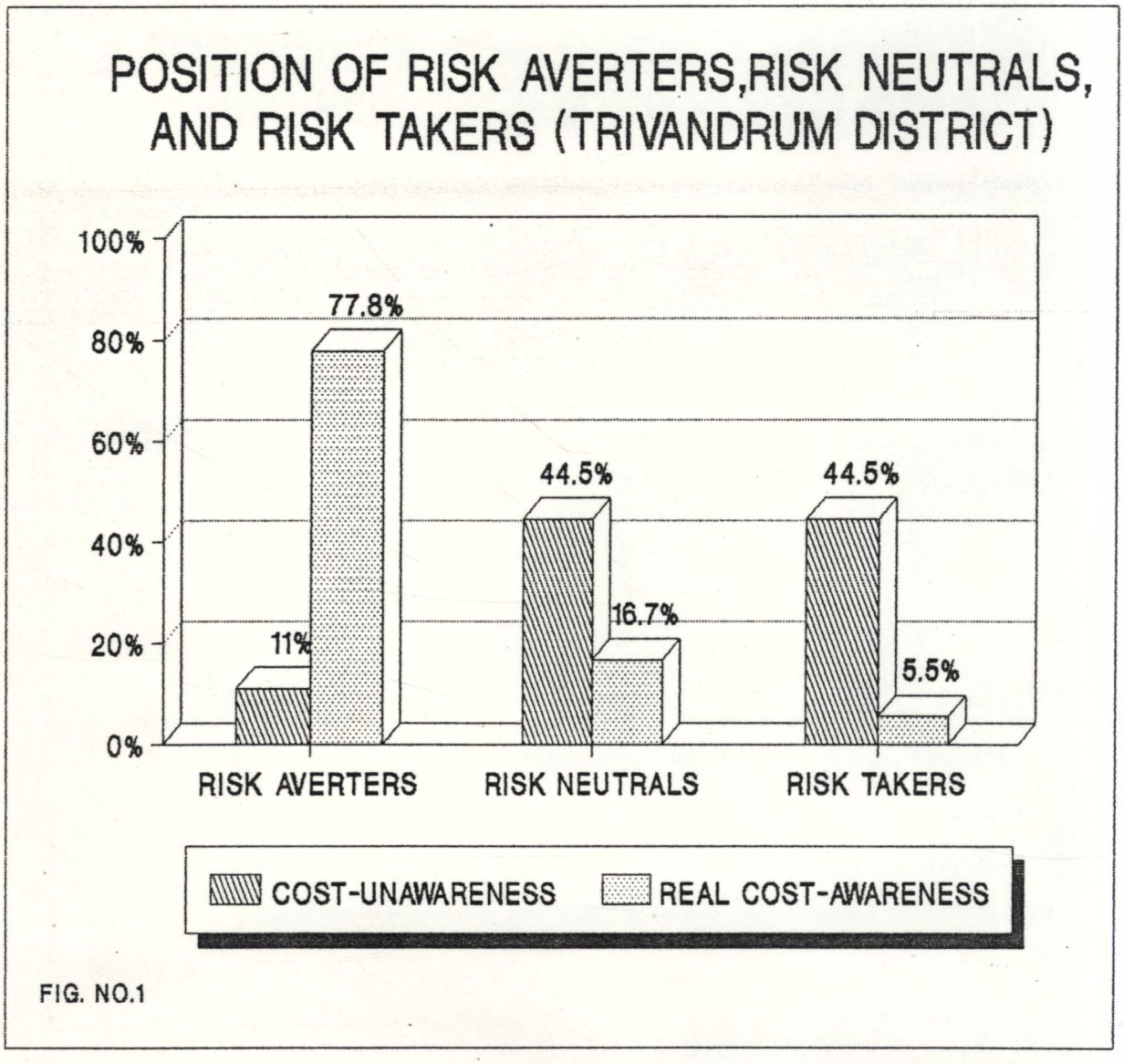

FIG. NO.1

APPENDIX III

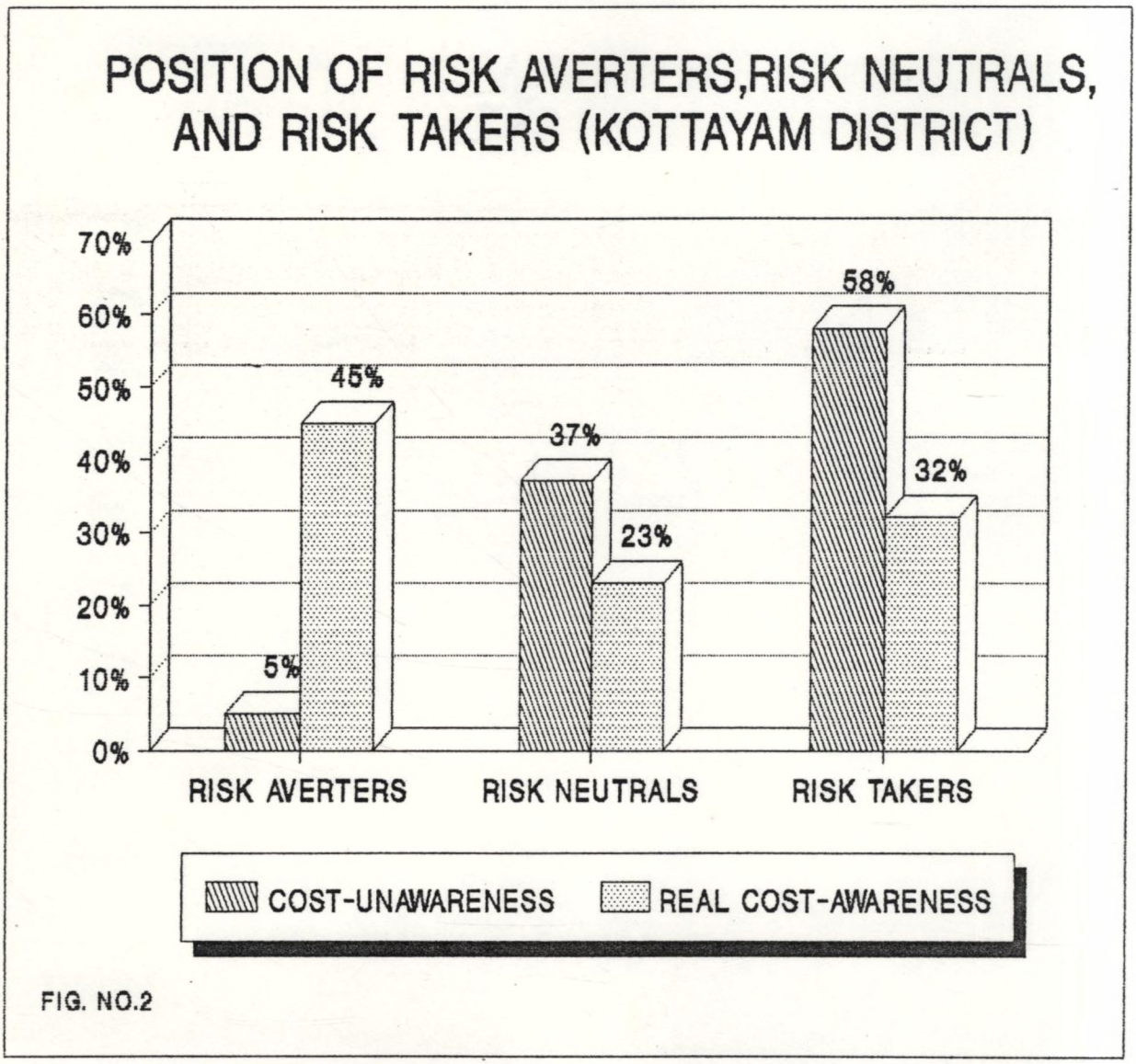

FIG. NO.2

APPENDIX IV

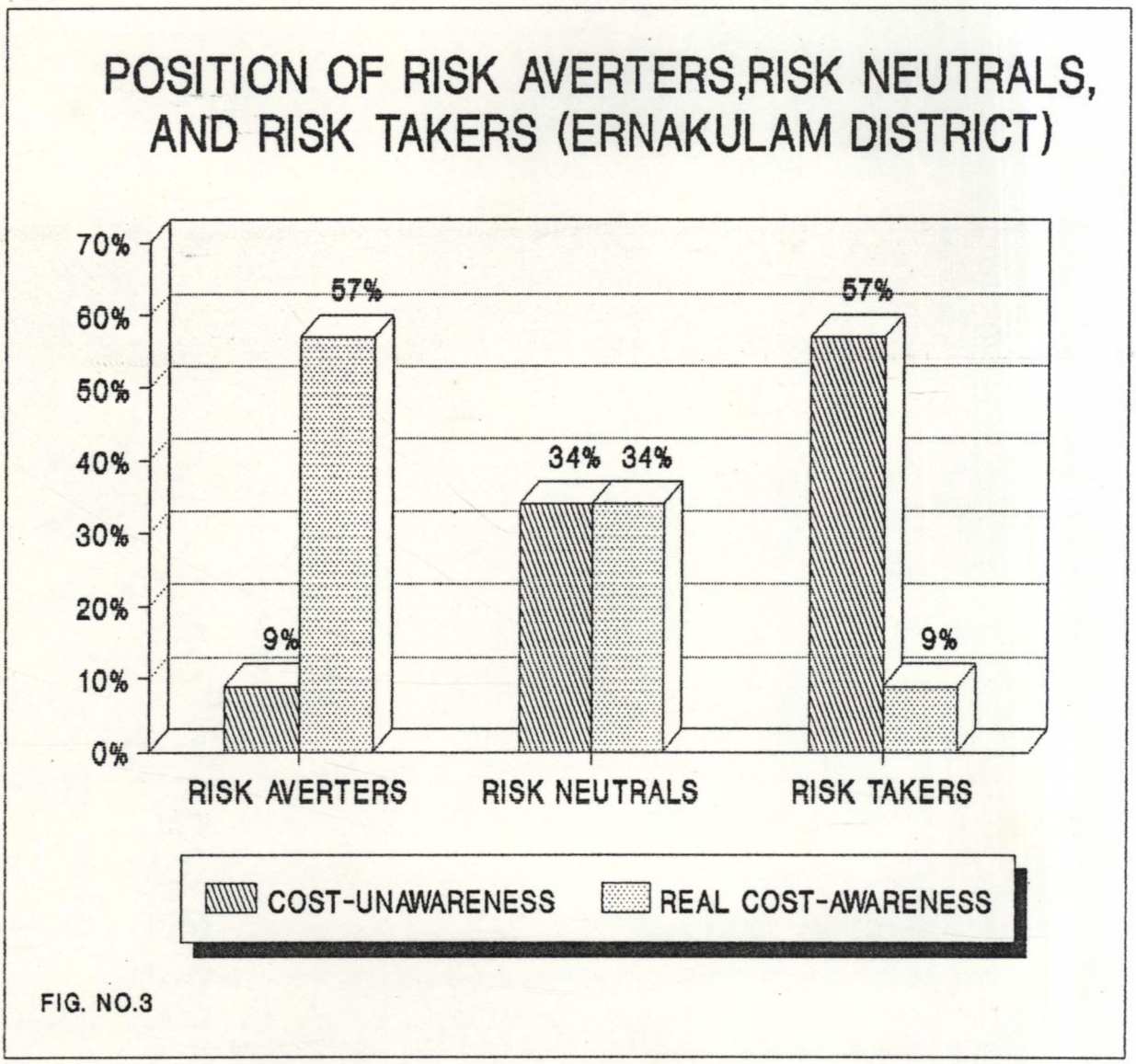

FIG. NO.3

APPENDIX V

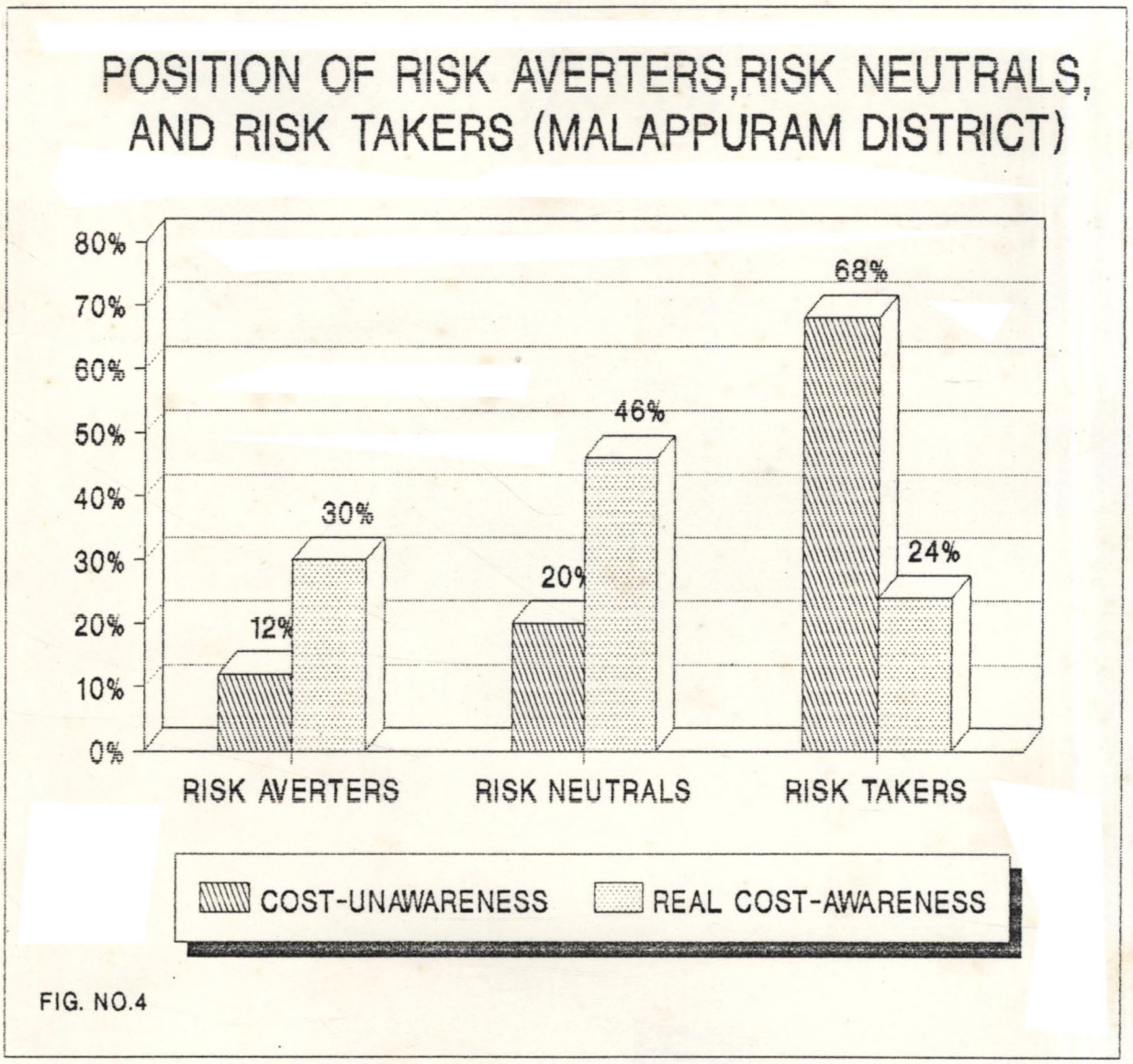

FIG. NO.4

APPENDIX VI (a)

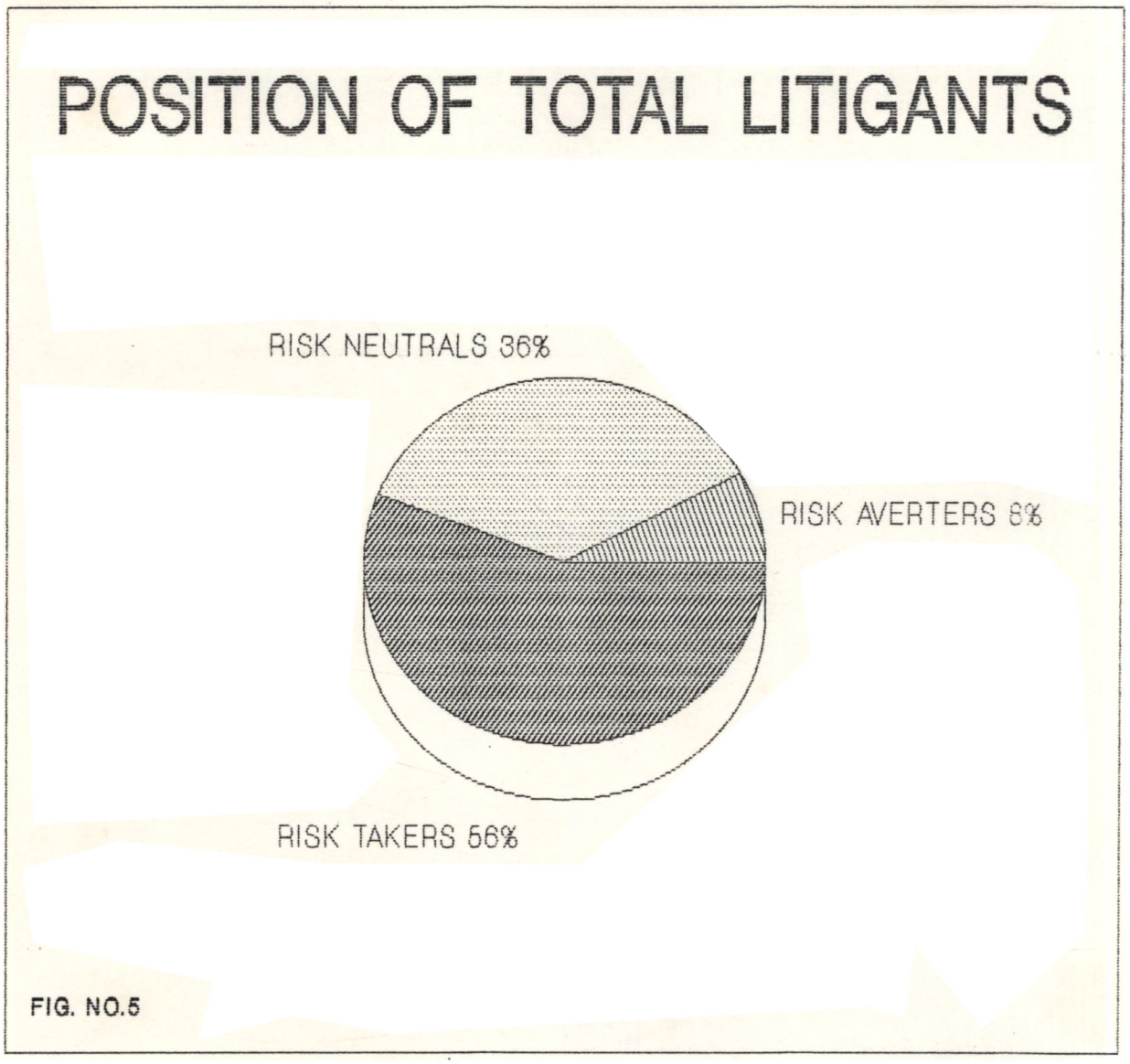

FIG. NO.5

APPENDIX VI (b)

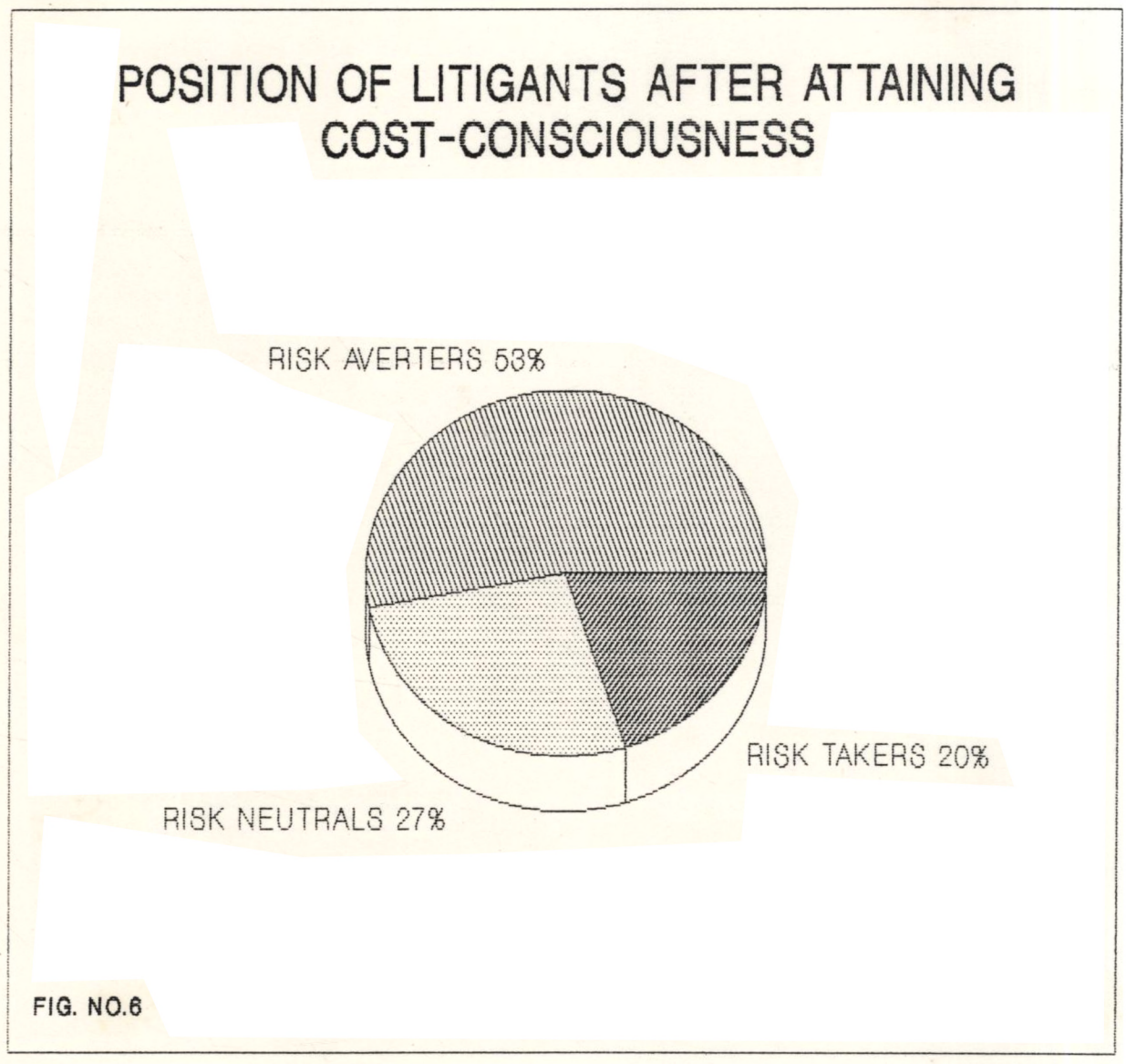

FIG. NO.6

APPENDIX VII

QUESTIONNAIRE FOR LITIGANTS IN PRIVATE IMMOVABLE PROPERTY LITIGATIONS

I. GENERAL INFORMATIONS

1. Name and Address of litigant :

2. Occupation :

3. Age :

4. Sex :Male/Female

5. Marital Status :Single/Married

6. Education :

7. Annual Income :Rs._____

8. Plaintiff or Defendant :Plaintiff/Defendant

II. NATURE OF THE LITIGATION

1. Total amount of the immovable Property :Rs._____

2. Year and month in which the case filed (specify the district) :

3. Year of final decision of the case :

4. Nature of First Decision :Success/Failure

5. Do you think that the economic background of the opposite party is higher than yours? :Yes/No

6. Number of appeals made :

7. Year and nature of first appeal :Success/Failure

8. Year and nature of second appeal :Success/Failure

9. What was the expected economic benefit from the suit? :Yes/No

III. COST CONSCIOUSNESS IN LITIGATION

1. Do you keep correct record of litigation expenses? :Yes/No

2. Do you make any estimations about the prospective costs and benefits before going for suit? :Yes/No

3. Are you aware of the prospective costs needed for appeals? :Yes/No

4. Do you generally include various type of indirect costs in total costs? :Yes/No

5. Are you aware of opportunity cost of suit i.e., the next best economic alternative forgone by you for your litigation? :Yes/No

6. Do you make rational analysis about the economic costs and benefits after litigation? :Yes/No

7. Are you aware of the prospective delays that may occur in your suit and its impact on costs? :Yes/No

8. Have you got any previous experience in litigation? :Yes/No

9. Do you have the belief that litigation is more beneficial than out of court settlement? :Yes/No

IV COST OF LITIGATION

1. Did you expect economic gain from your suit? :Yes/No

2. What was the expected cost of this litigation? :Yes/No

A. **Direct Costs** (Please mention different type of costs below)

1. Advocates fee (Give the total amount) :Rs.

2. Court Fee :Rs.

3. Process Fee :Rs.

4. Fee for Advocate's Clerk :Rs.

5. Expenses for Commissions etc. :Rs.

6. Expenses for Injunction etc. :Rs.

7. Expenses for collection of evidence :Rs.

8. Batta for witnesses :Rs.

9. Expenses for executing the decree :Rs.

10. Other items (Specify the item) :Rs.

B. Indirect Costs

1. Travelling expenses :Rs.

2. Dearness allowance :Rs.

3. Wages or Salary to the labourers employed in litigation :Rs.

4. If you are an employee, financial loss occurred due to availing leave on loss of pay etc. :Rs.

5. Expenses for stay and other ancillary expenses :Rs.

6. Other expenses (specify the item) :Rs.

Total :Rs.

C. Hidden Economic Expenses

1. Was there any mental agony from your case? :Yes/No

2. Did the litigation affect your occupation in any manner, reduction efficiency etc.? :Yes/No

3. The negative impact of litigation on the occupation (measured in monetary terms) :

4. The negative impact of litigation on health and the resultant medical expenses. :

5. The monetary gain that would have attained if you had not affected by the mental agony due to the litigation :

6. Other expenses incurred due to the Civil Suit (expenses for the Criminal case etc.) :

Total :

==========

D. Opportunity Costs

1. The normal return on money capital invested in litigation, which you would have earned if invested outside :

2. The wages or salary you could have earned if sold your services to others :

3. If the immovable property had not been affected by the litigation the normal return that would have attained :

4. The money rewards for the factors owned and employed in litigation including the time devoted on litigation :

5. The normal return on the money capital borrowed for litigation, if invested outside :

6.	The difference between the real interest rate and the normal rate fixed by court	:
	Total	:
	Grand total	:

V. ECONOMIC FACTORS IN LITIGATION

1.	Did you ever make any out of court settlement even incurring financial loss considering the prospective heavy cost that may incur in the litigation? (if so please specify the amount)	:Rs.
2.	Did you ever discontinue the case due to financial reason?	:Yes/No
3.	Did you ever abandon the case due to delay in disposal?	:Yes/No
4.	Did you ever loose a case due to inability of incurring heavy costs?	:Yes/No
5.	Was there any unreasonable delay in executing the decree?	:Yes/No
6.	Did you make any out of court settlement for economic benefit after the filing of the case?	:Yes/No
7.	Did you ever take up a once lost litigation and succeed it as appeal after attaining economic power?	:Yes/No

8. Did you ever forgo the service of well qualified and well experienced Advocates due to their heavy fees? :Yes/No

9. Did you forgo the opportunity of going for an appeal due to the inability of incurring high litigation costs? :Yes/No

VI. NATURE OF COSTS AND BENEFITS

1. At present do you think that the real cost of litigation is higher than that of you have expected? :Yes/No

2. Even after knowing the various aspects of costs, if there is any reason for litigation, will you go for it? :Yes/No

3. At present do you think that out of court settlement was more economically beneficial than the litigation? :Yes/No

VII. BENEFITS FROM LITIGATION

1. The total monetary benefit from your litigation :Yes/No

2. The total amount received from court as court expenses :Yes/No

3. Do you think that the benefits from your litigation is grater than the costs incurred for litigation? :Yes/No

4. Was your benefit from the suit nearly equal to litigation cost? :Yes/No

VIII. PROCEDURAL AND LINGUISTIC FACTORS

1. Do you have any experience of not going for litigation due to the fear and ignorance of litigation? :Yes/No

2. Did the existing court procedures and court language obstruct the litigation in any way? :Yes/No

3. Do you believe that the existing court fee is too high? :Yes/No

4. Should it be further reduced or abolished? : Reduced/abolished

IX ALTERNATIVE PROVISIONS FOR LEGAL SERVICES

1. Did you avail yourself of any free legal aid from the State government? :Yes/No

2. Did you find any difficulty in getting free legal aid from the State government :Yes/No

3. Were you be able to win the case with free legal aid from the State government? :Yes/No

4. Did you participate in any Neethimela? :Yes/No

5. Do you think that the Neethimela, Public Interest Litigation etc. could help in reducing the cost of litigation? :Yes/No

6. Do you feel that these alternative provisions are sufficient to reduce the existing cost of litigation in the private immovable property litigation? :Yes/No

X. SUGGESTIONS AND RECOMMENDATIONS

1. Do you believe that time bound disposal of cases could reduce the cost of litigation? :Yes/No

2. If there is a judicially sanctioned permanent alternative provision for redressing grievances which can avoid unnecessary delay and cost, would you approach for its services. :Yes/No

3. Do you think that advocate fee should be fixed? :Yes/No

4. Are you in favour of increasing the rights of committed social action groups to deal with economic litigations of poor people? :Yes/No

5. Do you feel it necessary that appeal should be reduced for reducing the cost of litigation? :Yes/No

6. Do you believe that civil laws should be simplified in regional language for creating legal awareness and cost consciousness among litigants? :Yes/No

7. What according to you are the major reasons for the heavy cost of litigation? :Yes/No

8. Do you think that specialised judicial machinery for dealing with the private property litigations can reduce the cost of litigation? :Yes/No

9. Can you suggest some pragmatic ways for reducing the cost of the private property litigations? :Yes/No

10 Do you welcome a provision for insurance in the private property litigations? :Yes/No

11 Do you believe that the existing cost-structure of private property litigations should be revamped for reducing the cost in the disposal of justice? :Yes/No

12 Do you welcome judicial provisions for the settlement of economic disputes outside courts by a board of conciliation? :Yes/No

In addition to the above mentioned consideration is there anything to be added about the cost in the disposal of justice, please mention it.

What is the practical use of this study for you:-

APPENDIX VIII

QUESTIONNAIRE FOR LEGAL PROFESSIONALS

I. GENERAL INFORMATION

1. Name and Official Address of Judicial Officer/Advocate/Legal Professional :

2. Age :

3. Educational Qualifications :

4. Total years of service/Bar experience :

II. COST OF LITIGATIONS

5. Do you think that litigants are always capable of realising their expected economic benefit after incurring different types of costs in their litigations? :Yes/No

6. Have you seen cases where the total economic cost exceeded the economic benefit from litigations? :Yes/No

7. By and large do courts make any observation regarding excessive cost of litigation and its incidence? :Yes/No

8. What type of costs do you generally include in private immovable property litigations? (please mention the items below) a. Advocate fee b. Court fee c. Process fee d. service charge e. Indirect cost :Yes/No

9.	Do you consider the next best economic alternative forgone by the litigant for his litigation?	:Yes/No

III ECONOMIC FACTORS IN LITIGATION

10	Do you have any experience of seeing people not going for litigation solely owing to their inability in incurring the cost of litigation?	:Yes/No
11.	Do you have any instance of litigants discontinuing their once filed case owing to their inability to incurring heavy cost of litigation?	:Yes/No
12	Considering the heavy economic cost did litigants ever settle their disputes incurring a financial loss?	:Yes/No
13	Do you have occasions of litigants losing their litigation owing to their inability in incurring heavy costs?	:Yes/No
14	Do you have experience of litigants taking their once lost litigation and succeeding in it with an appeal after attaining economic power?	:Yes/No
15	What is your opinion about the existing system of court fee in Kerala?	:Very High/ Reasonable/High
16	Do you have the opinion that the court fee should be reduced or abolished?	:Reduced/ Abolished
17	Do you believe that the financially weaker sections of society are really benefited by free legal service facilities of the state government?	:Yes/No

IV SUGGESTIONS AND RECOMMENDATIONS

18	Do you believe that the Neethimela, Public interest litigation etc. are really beneficial in reducing the cost of civil litigation?	:Yes/No
19	Do you believe that these alternative provisions are sufficient to reduce the existing cost of litigations?	:Yes/No
20	Do you believe that delay in the administration of private justice is a major reason for the heavy cost of litigation?	:Yes/No
21	Do you welcome the provision for insurance in private property litigations?	:Yes/No
22	Are you in favour of time bound disposal of private in property litigations?	:Yes/No
23	Do you think that specialised judicial machinery for dealing with private property litigations can reduce the heavy cost of these litigations?	:Yes/No
24	What according to you are the major reasons for the heavy cost litigation?	:Yes/No
25	Can you suggest some pragmatic methods for reducing unnecessary delay in the disposal of private property litigations?	:Yes/No
26	Can you propose some practical Suggestions for reducing the cost of the private property litigations?	:Yes/No

27 Do you believe that the existing cost-structure of private property litigations in Kerala should be revamped for reducing the cost of litigations? :Yes/No

* In addition to the above mentioned questions there is anything which worth to be added about the cost of the litigations if there, please do give it.

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