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."

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.

"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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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.

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.  

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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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 signifies 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 Parasaramrthi, the Naradasmrthi, the Brahaspatismrthi and the Katyayanasmrthi.

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

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 amongst 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 onwards**

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 inter se, 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.  

**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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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

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".

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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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.  

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

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 Midayatullah 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 Baxi¹² 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.
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 occasions it takes more than six months 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 seem 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

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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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."\textsuperscript{15}

The principle of occupation best explains the acquisition 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 thereby becomes his property.

\textsuperscript{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.\textsuperscript{16}

The labour theory is not immune from criticism. The important criticism can be directed to the fact that Locke\textsuperscript{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

\textsuperscript{16} Girard, Mannuel elementaire de droit romain, 1901, p.13

\textsuperscript{17} Locke "Two Treatises of government" 1824, p.65
it is essential that property has the definite character of being his in particular.\textsuperscript{18} This is the Hegelian justification of private property.

(d) \textbf{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,\textsuperscript{19} Montesquie\textsuperscript{20} and

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

\textsuperscript{19} Hobbes, Leviathan 16551, p.91.

\textsuperscript{20} Montesquie, Spirit of Laws 1823, Book 26, Chapter XV, p.35
Bentham 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."  

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 Iowa 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 property 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." 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, "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. 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.
The roots of this doctrine lie in the rich field of medieval thought and reach down 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.  

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 Province, 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

\(^{28}\) Finilman "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 on 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 amendment 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."  