

Friday, April 1, 2011

# LEGIS BYTES

Page 11

LAWS GOVERNING  
CHILD CUSTODY &  
GUARDIANSHIP  
IN HONG KONG

Page 16

COPENHAGEN SUMMIT:

Page 4

SOFTWARE  
PATENTS IN  
U.S, EU, U.K,  
AND INDIA

Page 21

PRINCIPLE OF  
UTI POSSIDETIS  
AND INTERNATIONAL  
BORDER CONFLICTS



A STEP  
AHEAD  
OR BEHIND?



**Keynote from the chief editor  
Liza Meghan (first issue)**

**Hi Readers,**

I am delighted to welcome you to the first issue of Biz & Legis E-Journal 'Legis Bytes,' Kerala's premier communications law journal and the official journal of B&L. Our staff is very excited to present this very special issue.

We are pleased to feature articles on various legal areas as well as on some critical topics which require immediate concern. The issues cover various jurisdictions and continents.

The year 2010 will go down in history as one of the hottest year with many other extreme climate and weather events. So one of our article deals with the Copenhagen Summit on climate change; how far it was a success and the resultant political agreement.

We have another interesting feature on Laws Governing Child Custody and Guardianship in Hong Kong where the author who had done an extensive research in various laws in Hong Kong writes about four Ordinances and related matrimonial issues in Hong Kong. A write-up on Moral Rights explains about Berne Convention, its contributions to an author of a copyrighted work and the difference between how these rights are in India and US.

Under technology / computer law, we have featured an article on Software Patents in U.S., EU, U.K., and India. Software has been one of the relatively new areas to receive patent protection, but do these countries know to which extent these patents should be granted and the standards they should adopt while providing patents.

There is one write up on border conflict among the countries and the principle of Uti Possidetis, which is classified under Customary International law. Again we have some comments about the popular route nowadays for entrepreneurs; Limited Liability Partnership, enacted under the LLP Act 2008.

I would like to thank all my colleagues for their wonderful work and support for making this dream a reality. We are committed to all our readers for accurate and timely coverage on various legal and economic/non-economic issues.

Have a knowledgeable and well informed 2011



Jolly John

Mr. Jolly John is the Principal Partner of Biz & Legis. He has dual masters in Law. A specialist in Corporate and Information Technology laws, he is a registered lawyer with Bar Council of India since 1997. He had been a registered Foreign Lawyer with Law Society of Singapore. He worked with Baker and McKenzie, Singapore, in the Corporate Commercial (Information Technology) Practice Group.

## Message from principal partner

I am proud to pen the below words, on this first page of first issue of 'Legisbytes', the Ezine from Biz & Legis.

It is the confluence of hard work, resilience, team spirit and expertise that makes us who we are. With just five clients two years ago, B&L has grown to new heights and now we have reached the second phase of our growth.

2011 has been a golden bag of opportunities for us, we have achieved in the first quarter 75% growth, launched our new corporate website, introduced seven proprietary legal solutions, entered into JV with three universities, acquired many major clients and now pleased to unveil our online legal magazine.

B&L will always carry with us the progressive and entrepreneurial spirit that has become the firm's living mantra. As we continue to serve our clients enthusiastically, author scholarly articles, nurture and guide future lawyers, help in shaping future policies, we are putting into action our commitment to forward-thinking and preparing for the dynamically changing world of business law.

Once again, I sincerely thank all our clients, well-wishers and crew members without them B&L can't achieve anything.

I do hereby unveil 'Legisbytes' to the world.

# SOFTWARE PATENTS

## IN U.S, EU, U.K, AND INDIA

A patent is a set of exclusive rights granted by a State to inventors or his assignees for a limited period of time in lieu of public disclosure of their inventions. Under the traditional principles of intellectual property protection, the main purpose of patent law is to encourage scientific research, new technology and industrial progress. The fundamental principle behind patent law is that patent protection is accorded only to inventions, that is to say an invention must be novel and ought to have utility, to be eligible for patent protection. But what subject matters qualify as inventions vary as per the domestic laws of the respective countries. Computer software has been one of the relatively new areas to receive patent protection. The term 'software' does not have a precise definition. Software can be understood as to be the programs or other "instructions", that a computer needs to perform specific tasks<sup>1</sup>. In other words, the term 'software' is used to describe all the different kinds of computer programs. The term 'software patent' also

*Computer software has been one of the relatively new areas to receive patent protection. Now that countries are slowly opening up to the idea of patenting software-related inventions, the major question facing them is the extent to which these patents should be granted. Which is the standard they must adopt???*

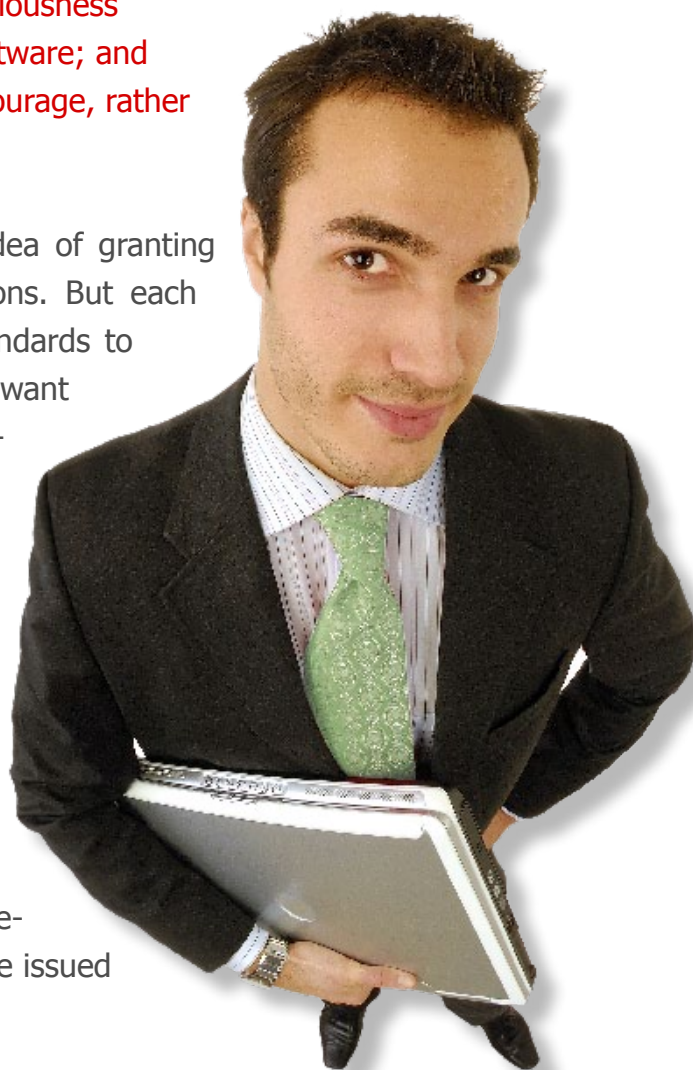
does not have a universally accepted definition<sup>2</sup>. One definition suggested by the Foundation for a Free Information Infrastructure is that, a software patent is a “patent on any performance of a computer realised by means of a computer program<sup>3</sup>”. In other words, Software patents refer to patents that could be granted on products or processes which include or may include software as a significant or at least necessary part of their implementation, i.e. the form in which they are put in practice (or used) to produce the effect they intend to provide<sup>4</sup>. The patentability of software-related inventions is currently one of the most heated areas of debate. The growing economic significance of computers and computer programs gives software patents this contentious status. The debate, as to whether software patents should be granted or not, continue till date. Considering that a country agrees to grant software patents, the next question that arises is the extent to which patents should be granted. Some of the important issues concerning software patents include:

- Where the boundary between patentable and non-patentable software should lie;
- Whether the inventive step and non-obviousness requirement is applied too loosely to software; and
- Whether patents covering software discourage, rather than encourage, innovation.

Most countries are now opening up to the idea of granting patent protection to software-related inventions. But each of these countries have adopted different standards to decide the scope of patent protection they want to grant to software-related inventions. Accordingly, I would like to bring to your notice the different laws prevalent in U.S., EU, U.K., and India with respect to Software patents.

#### Position in U.S.

Software was not always given patent protection in the U.S. This trend has gradually changed over a period of time. As of today, software is patentable in the U.S. In the 1960s, the USPTO (U.S. Patent Office) was reluctant to grant patents on inventions related to Computer Software. In 1968, the Office issued



formal guidelines for computer related inventions to formalize this reluctance. These guidelines stated that a computer program, whether claimed as an apparatus or as a process, was non-patentable. Under these guidelines, an invention relating to a programmed computer could be patentable only if the computer were combined with other, non-obvious elements to produce a physical result<sup>5</sup>. In the 1970s, the Supreme Court examined the question of patentability of inventions containing computer software. In these cases the Supreme Court held that inventions containing computer software were non-patentable<sup>6</sup>. In the 1980s, the Supreme Court's decision in *Diamond v. Diehr*<sup>7</sup> forced the USPTO to change its stance. In this case, the Supreme Court ordered the PTO to grant patent, even though the invention had utilized computer software. The court, in this case, essentially ruled that while algorithms themselves could not be patented, devices that utilized them could be patented. Since this decision was not very straightforward, the PTO and the inventors were left trying to determine as to when an invention was simply a mathematical algorithm and when was it a patentable invention, though it utilized a mathematical algorithm. In the 1990s, after the Federal Circuit was set up, it clarified the situation as to when a software relation invention could be patentable. It was laid down that if an invention in actuality is only a mathematical algorithm, then it was not patentable. But if an invention utilizes computer software to represent concrete, real world values then the invention is patentable. In 1998, the Federal Circuit issued its *State Street Bank & Trust v. Signature Financial Group*<sup>8</sup> decision, which further clarified the patentability of computer software in the United States. In this case, the Court explicitly stated that business methods can form patentable subject matter. It further emphasized that software or other processes that yield a useful, concrete and tangible result should be considered patentable. In 2008, the Federal Circuit in *In re Bilski* set forth a single test for determining the patentability of processes. This test held that a process is patentable if "(1) it is tied to a particular machine or apparatus, or (2) it transforms a particular article into a different state or thing." The Supreme Court rejected the Federal Circuit's holding in *In re Bilski* that the machine-or-transformation test is the sole test to determine whether a particular process constitutes patent-eligible subject matter. While the Supreme Court did not completely throw out this test, and in fact called the test useful and important, the Court held that this is not the sole test for determining patent eligibility for processes.

*"The debate as to whether software patents should be granted or not continue till date. Considering that a country agrees to grant software patents, the next question that arises is the extent to which patents should be granted."*

### Position as of today

Now the machine or transformation test can no longer be considered as a part of the definition of process. As the law now stands, processes that fail the machine or transformation test are likely to be unpatentable for pre-empting an abstract idea, while processes

that pass the test are likely to be patentable for they do not pre-empt an abstract idea. But this preliminary conclusion arrived at can be overcome with an argument to the contrary.

### Position in European Union

The patentability of software, computer programs and computer implemented inventions under the European Patent Convention (EPC) is to the extent to which the subject matter in these fields is patentable under the Convention on the Grant of European Patents of October 5, 1973. As per Article 52 of the EPC, 'programs for computers' are not regarded as inventions as such in order to be eligible to be granted patents. The reason for the same, in theory, is that a program does not produce a technical effect, which is sine qua non to obtain a patent, and accordingly does not qualify to become an invention. But the practice has been different. The EPC has been interpreted by the European Patent Office (EPO) in a way that excludes only computer programs when they are claimed to be "the invention" itself as that would be a claim to an excluded subject matter "as such"<sup>9</sup>.

The case is the first of a series of cases heard by the Technical Board of Appeal of the EPO, wherein it began to sketch the boundaries between a computer program as such on the one hand, and an invention making a technical contribution, albeit implemented in software, on the other. The Board granted the patent in this case since it made a 'technical contribution to the prior art'. The Board in yet another case<sup>10</sup> held that 'technical contribution to prior art' could either be a technical problem (to be) solved or a technical effect achieved by the solution. Subsequently, the principle shifted from requiring a contribution of this "technical contribution" to requiring the presence of the "technical character" element in the invention itself. In the decision of *Hitachi* (T/258/03) it was stated that "What matters, having regard to the concept of invention within the meaning of Art. 52(1) EPC, is the presence of technical character which may be implied by the physical features of an entity or the nature of an activity, or may be conferred to a non-technical activity by the use of technical means". But nowhere was the term "technical character" defined. Instead, the EPO in *PBS Partnership* (T-931/95) stated that "the meaning of the term "technical" or "technical character" is not particularly clear." Thus, although the EPO did grant many patents for computer programs, the grounds for doing so do not seem to be clear at all as the term "technical character" was never defined<sup>11</sup>.

### Position as of today

According to the new trend, a computer program can be considered a patentable invention if, when run on a computer, it creates a "further technical effect": a technical effect that goes beyond the normal physical interaction between hardware and software. The Board considers a technical character in further effects deriving from the execution of the instructions given by the computer program where these further effects have a technical character or cause the software to solve a technical problem<sup>12</sup>. Thus, in EU software is patentable if they make a "further technical effect".

### Position in U.K.

The Patent Law in United Kingdom is understood to have the same effect as the EPC. Consequently, 'programs for computers' are not regarded as inventions as such even in U.K. in order to be eligible to be granted patents. The current trend here is that an alleged invention will be regarded as an invention only if it provides a contribution that is not excluded and is technical<sup>13</sup>.

The first case in U.K. which dealt with the question of whether or not a patent or patent application involving the use of a computer program related to an invention, or whether, instead, it related to a computer program "as such", was the *Fujitsu's Application*<sup>14</sup>. In this case, the following important points were laid down

- U.K. Courts should look into the decisions of EPO for guidance in interpreting the exclusions
- A "technical contribution" is essential to make a potentially excluded thing patentable.
- It is difficult to determine what is and what is not "technical", and each case is to be decided on the basis of facts therein.
- The substance of an invention should be used to assess whether or not a thing is patentable, not the form in which it is claimed. Thus, a non-patentable method cannot be patented under the guise of an apparatus.

One of the loopholes of the *Fujitsu* judgment was that it did not say anything about the inventive step or how the inventive step should be considered when assessing inventions involving computer programs. Even the *Vicom* case, on which the U.K. Court of Appeal had placed reliance, had not discussed anything in relation to inventive step. As a result, a lot of discrepancy was seen in the practices of UKIPO and EPO in the next seven years. The EPO modified the idea of a technical contribution to focus on inventive step and whether there was anything that provided a non-obvious technical solution to a technical problem. The UKIPO, in the meantime, remained rooted in a regime where the question of inventive step of computer program inventions was largely ignored in favour of rejections that there was no technical contribution and therefore no invention. The subsequent decision of the U.K. Court in 2005 in the case of CFPH LLC's applications<sup>15</sup> brought the U.K. law closer to the practice of the EPO. But it also criticized the reliance of the EPO on paraphrasing the exclusions from patentability under the blanket heading of "technical".

Further, in 2006, the Court of Appeal in its decision in the matter of *Aerotel v. Telco and Macrossan's Application*<sup>16</sup> reaffirmed its reasoning in *Fujitsu* case and once again moved the practice of the UKIPO away from that of the EPO. An appeal from this case was made to the House of Lords, but it refused leave to hear the appeal. Consequently, in the absence of any decision in this regard by the House of Lords, the decision given by the Court of Appeal in this case holds good.

### Position as of today

Thus, the position of law as of today in U.K. is that a computer program may be granted a patent only if qualifies to be an invention by providing a technical contribution which is not excluded.

### Position in India

The position in India in relation to granting of patents for software is close to that of the EU member countries. The Patents Act mentions about computer programs in Section 3 (k) under the head 'Inventions which are not patentable'. Thus, a computer program "per se" is not eligible for a patent in India. The Webster's Encyclopedic Unabridged Dictionary defines the term 'per se' so as to mean 'in itself' or 'intrinsically'. Thus, we may construe that if the alleged invention is shown to be something more than mere software, then it may qualify for a patent in India. It can also be said that an invention shall not become unpatentable simply because it was implemented with software. Like the EU countries, in India also the gaining of patent protection for software depends more on the drafting skills of the Patent Engineer. If the claims are drafted in such a way as to reflect that the invention is not software per se, it shall qualify for patent protection<sup>17</sup>.

### Position as of today

Till date, the Indian Patent Office or Indian Courts have not got an opportunity to decide the legality of grant of patents to inventions involving software. Thus, the position of law in India as of today is that while a mathematical or a business method or an algorithm cannot be patented, a computer programme which has a technical application in any industry or which can be incorporated in hardware can be patented. Accordingly, we can say that India has adopted the conservative approach of the European patenting norms for software. This, along with judicial decisions, should sufficiently be able to ensure that there is judicious patent protection for software while allowing the industry to grow through inventions and innovations, thereby mitigating the risk of trivial patents throttling real inventions and innovations. Now whether granting of software patent will remain rigid or whether its scope will broaden through application as in U.S. is yet to be seen.

### Conclusion

A perusal of the laws in relation to software patents in all the above mentioned four countries shows the trend that computer programs, algorithms, mathematical methods and business methods are generally not by themselves patentable. Whether to grant or deny software patents has been determined by the National Courts in the light of the ability of the inventor to draft the patent claims in such a manner so as to show that the invention is not a mere 'software', but an application which utilizes the software so as to make it capable of having some industrial application or technical effect. Accordingly,

the National Courts have limited or broadened the scope as to when an invention utilizing software can be granted a patent.

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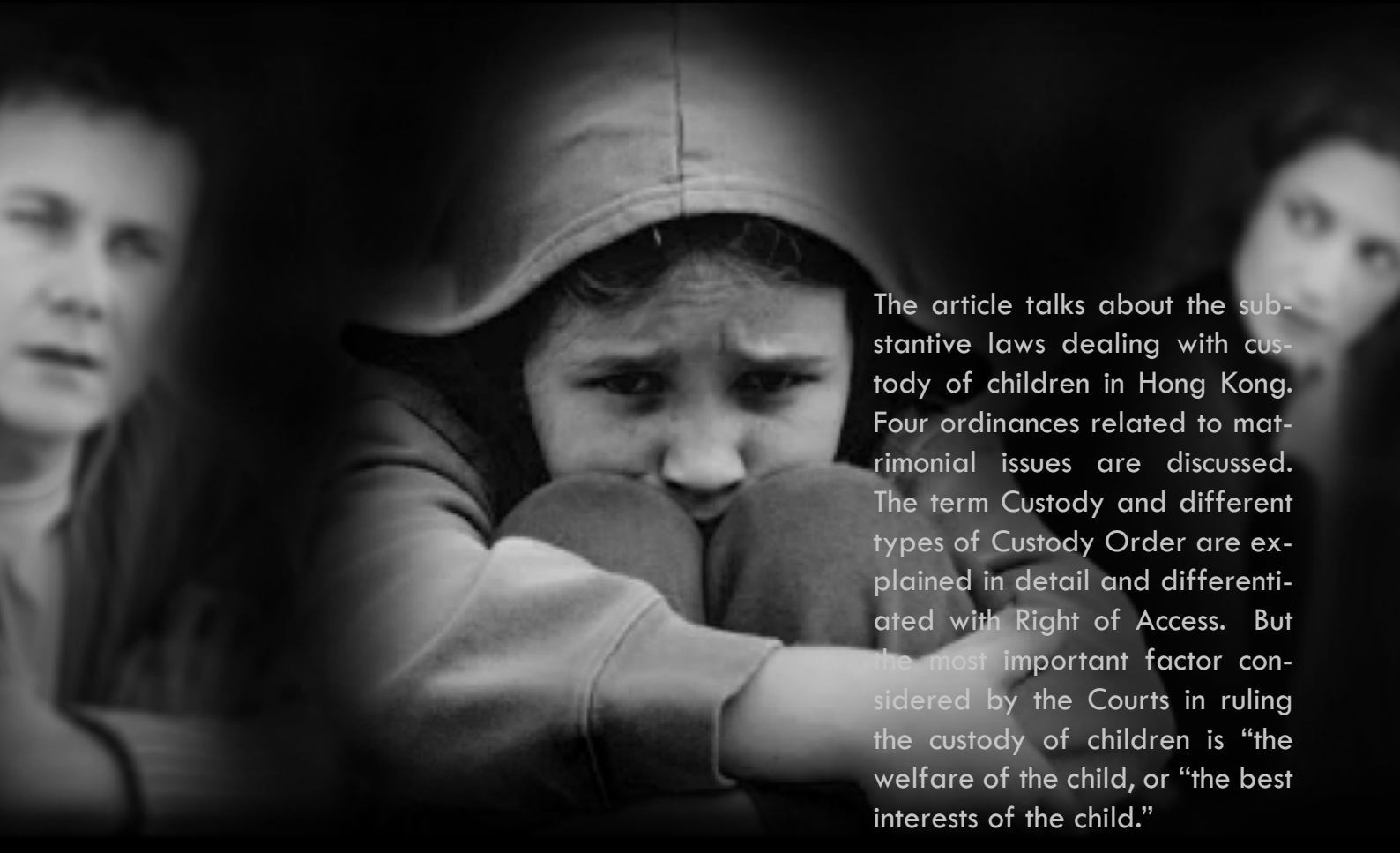
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## ABOUT THE AUTHOR

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# LAWS GOVERNING CHILD CUSTODY & GUARDIANSHIP IN HONG KONG



The article talks about the substantive laws dealing with custody of children in Hong Kong. Four ordinances related to matrimonial issues are discussed. The term Custody and different types of Custody Order are explained in detail and differentiated with Right of Access. But the most important factor considered by the Courts in ruling the custody of children is “the welfare of the child, or “the best interests of the child.”

**B**eing one of the two special administrative regions of People’s Republic of China, Hong Kong has secured an independent judicial system within the common law framework. Basic Law of Hong Kong is its constitutional text which governs the country. The country is governed by the principle of “One Country Two Systems” which makes it grossly different from the mainland China. The substantive laws dealing with custody of children in Hong Kong is basically contained in different ordinances related to matrimonial issues. They are:

- (1) Guardianship of Minors Ordinance (Cap. 13) (“GMO”)
- (2) Matrimonial Causes Ordinance (Cap. 179) (“MCO”)
- (3) Matrimonial Proceedings and Property Ordinance (Cap. 192) (“MPPO”)
- (4) Separation and Maintenance Orders Ordinance (Cap. 16) (“SMOO”)

***The Guardianship of Minors Ordinance*** administers court proceedings related



to custody and upbringing of children. The ordinance is basically based on the principle of welfare of the child in question. The first and paramount consideration of the courts in this regard shall be the welfare of the child as in any other common law system. The rights and authorities of the father and mother of the child are equal except for children born out of wedlock.

To characterise the parent-child relationship, the term "rights and authority" of the parents towards the child is used in the Guardianship of Minors Ordinance (Cap 13). Though not defined in the Ordinance itself, these rights can be found at common law and in statute. They include:

- The right to live with the child and control the child's day-to-day upbringing
- The right to the physical "possession" and "services" of the child

- The right to choose the child's education
- The right to choose the child's religion
- The right to choose the child's surname
- The right to inflict moderate punishment on the child
- The right to consent to medical treatment for the child
- Certain rights to enter into contracts on the child's behalf
- The right to act for the child in legal proceedings
- The right to administer the child's property
- The right to appoint a testamentary guardian for the child
- The right to consent to an application for a passport for the child
- The right to arrange for the child to leave or emigrate from the jurisdiction
- The right to consent to the child's marriage
- The right to consent to the child's adoption<sup>1</sup>.

Section 10(1) of the Guardianship of Minors Ordinance states that:

"The court may, on the application of either of the parents of a minor ... or the Director of Social Welfare, make such order regarding -

(a) the custody of the minor; and

(b) the right of access to the minor of either of his parents,

as the court thinks fit having regard to the welfare of the minor and to the conduct and wishes of the parents<sup>2</sup>."

A custody order may be made only with respect to "a minor," and does not extend beyond the child's reaching the age of 18. Such access order may be granted only to a parent of the child. An order of custody or access can be discharged, varied, revived after suspension or suspended by a subsequent court order. This type of subsequent application may be made by either parent or a guardian of the child, or on the application of any other person having legal custody of the child.

Section 3 of the Interpretation and General Clauses Ordinance (Cap 1) defines the term "minor" as a person who has not yet attained 18 years. Similarly, orders for maintenance of the child may extend beyond the child's 18th birthday where, for instance, the child is still undergoing education or training<sup>3</sup>.

**Matrimonial Causes Ordinance** deals with divorce and rule of procedure for custody applications are contained in Matrimonial Causes Rules. Under rule 95 of the Matrimonial Causes Rules (Cap 179), a judge or registrar may refer a case for investigation and report by the Director of Social Welfare on any matter arising in matrimonial proceedings which concerns the welfare of a child<sup>4</sup>.

Section 19 of **Matrimonial Proceedings and Property Ordinance** gives power to the courts to make such other orders as it find fit for the custody and education of the child in matrimonial cases like divorce.

The term "Custody" comprises a bundle of rights that parents have over their children which includes the right to "care and control" and the right to make all important decisions affecting the child. Decisions like a child's education, religion and medical treatment comes under "care and control". Whereas, "Access" is the right to have contact with the child, such as through letters, emails, telephone calls, visiting the child, taking him out or having him to stay from time to time. Nevertheless, the right of access is included within the broader right of custody itself. The degree of access granted can differ, depending on the circumstances of the case.

"Joint custody" is where the court grants custody to both parents, although physical care and control is usually granted to only one of them. The underlying principle behind a joint custody order is that instead of one party being given the right to decide important matters affecting the upbringing of the child, both parties are given that right. "Such orders denote divorced or separated parents playing a joint role in the upbringing of the child, and neither is excluded."

As stated by Judge Melloy in her Judgment dated 10 September 2007 (unreported) in S and Z FCMC No. 14535 of 2005, joint custody means that the parents should be able to make the major decisions concerning their children's life together. Although there have been cases where joint custody has been ordered where the parties find it difficult or indeed impossible to co-operate with each other, the general rule of thumb is that joint custody should only be ordered where the parents are able to work together effectively.

Article 18(1) of the UN Convention on the Rights of the Child obliges state parties to use their best efforts to ensure recognition of the role of parents in protecting the interests of children and that both parents have common responsibilities for the upbringing and development of the child. In Hong Kong custody is almost treated equivalent to guardianship and sole custody orders are common. In "Sole Custody" the non-custodial parent in these circumstances is effectively excluded from having any decision-making role on matters affecting the welfare of the child.

Another type of custody order is the "split order." This type of order vests daily care and control in one parent and gives custody, in the sense of wider decision-making power, to the other parent. Such orders "aims to protect a role for the missing (but yet custodial) parent on most important decisions concerning the child's development." Nevertheless, a split order "is unworkable where parents cannot agree and co-operate on matters relating to the upbringing of the child."

It is pertinent to note that litigation regarding children revolves around the concepts of "the welfare of the child, i.e., "the interest of the child" and "the best interests of the child." This concept guides the court in proper decision making in cases relating to children. The welfare principle usually encompasses the widest possible meaning while considered by the courts. The meaning does not confine to any considerations of money and physical comfort for the child, but includes consideration of his social, intellectual, moral and religious welfare, as well as his ties of affection.

Factors determining the welfare of the child can be as follows:

- The wishes and rights of the child (considered in relation to his age and level of understanding);
- The child's physical, emotional and educational needs;
- The desirability of maintaining continuity of care for the child and the likely effect on him of any change in circumstances;
- The child's age, sex, background and particular personal characteristics;
- Any harm that he has suffered or is at risk of suffering; and
- The capacity of each parent, or relevant third party, to care for the child and to meet his needs.

Maintaining the status quo, or "the state in which things are," has become a vital consideration in welfare. It is now recognised that: "Disruption of the status quo and the separation of the child from his psychological parent may be highly detrimental to his mental

and physical well-being.” The importance of maintaining the status quo is much reduced, of course, where a child is close to both parents and familiar with their respective homes. It is recognised that in these cases, “the disruption caused as a result of a change in custody will be much less<sup>5</sup>.”

All these factors are taken into consideration by the court in determining the best interests of the child. The court regard welfare of the child as paramount consideration in hearing any proceedings related to child custody. Judicial discretion is another important factor while dealing with custody matters. As stated by Liu, “The courts are dealing with the lives of human beings, and these cannot be regulated by any rigid prescriptions<sup>6</sup>.” As each case related to custody is unique in its own way the role of judicial precedents is very limited in deciding a case in this sphere of litigation.

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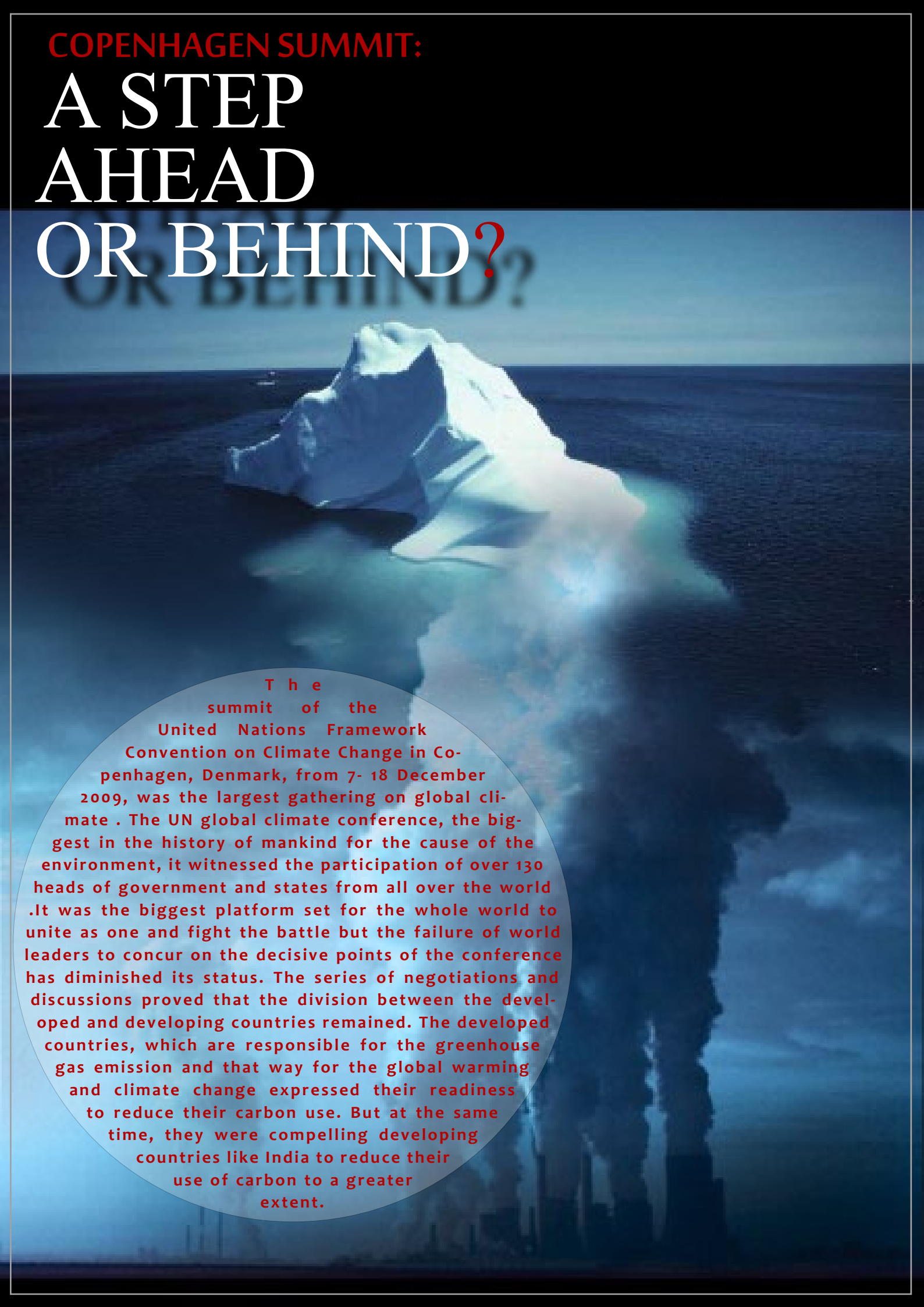
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## ABOUT THE AUTHOR :-



Vinitha Prasannan is an Advocate enrolled with the Bar Council of India in the year 1998 and the Senior Associate of Biz & Legis. As she is very passionate to her profession, she has a penchant towards the society. She is an active Life Member of Indian Federation of Women Lawyers and is a Counsel and legal advisor to both Foreign and Indian Clients in the field of Domestic and International Litigation, Corporate Drafting and in handling Intellectual Property, Real Estate Law and Business issues. She was in the State Brief Panel in High Court of Kerala and had handled Criminal matters as well. Her services include providing litigation support for attorneys and pro se clients in drafting court documents and legal documents in various jurisdictions including US federal and state courts.

# COPENHAGEN SUMMIT: A STEP AHEAD OR BEHIND?



The summit of the United Nations Framework Convention on Climate Change in Copenhagen, Denmark, from 7- 18 December 2009, was the largest gathering on global climate . The UN global climate conference, the biggest in the history of mankind for the cause of the environment, it witnessed the participation of over 130 heads of government and states from all over the world .It was the biggest platform set for the whole world to unite as one and fight the battle but the failure of world leaders to concur on the decisive points of the conference has diminished its status. The series of negotiations and discussions proved that the division between the developed and developing countries remained. The developed countries, which are responsible for the greenhouse gas emission and that way for the global warming and climate change expressed their readiness to reduce their carbon use. But at the same time, they were compelling developing countries like India to reduce their use of carbon to a greater extent.

The summit which took place from 7th December to 18th December was on the brink of collapse soon after it started. The difference of opinion between the United States and China emerged as a major cause of concern and the commanding attitude of the host country to formulate a declaration ignoring the poor and developed nations did not help the summit either. One of the biggest hurdles in the way of the climate change agreement was how to achieve adequate cuts in greenhouse gas emissions, in particular from big polluters like the United States and China. It was equally difficult to secure commitments from wealthy countries to pledge hundreds of billions of Dollars in financing to poor countries. The negotiations at Copenhagen were so debatable because of the impact these proposals will have on national economies. The four emerging economies – Brazil, South Africa, India and China, constituting the informal BASIC group played an absolute key role in Copenhagen.

During the summit US pledged to help build a 100 billion dollar annual fund by 2020, to bail out the poor countries coping with the impacts of climate change. US further urged all the participating countries to compromise on key demands in order to seal an international accord in Copenhagen, but didn't commit to anything other than the global fund. India appealed the developed countries to deliver in consonance with the guidelines of Kyoto Protocol. It was stressed that any new global accord announced at Copenhagen would go against international opinion if it dilutes the Kyoto Protocol. India advocated for continued negotiations until 2010 for a globally acceptable climate agreement and the African nations also advocated for the extension of Kyoto Protocol, which is expiring in the next two years.

“My impression is that through the whole process the real problem has been on the one hand the United States, who are not able to deliver sufficiently. Now they have started but they came very late. On the other hand you have China, and they delivered less. And they have been really blocking again and again in this process, followed by a group of oil states. That's the real differences, the real confrontations behind this. And the great victim of this is the big group of developing countries. The EU really wanted to reach out to the big group of developing countries. That was made impossible because of the great powers.”

**Environment Minister of EU,  
President  
Sweden Andreas Carlgren**

## The accord

The proposal for an accord in pursuit of the ultimate objective of the summit was presented in Copenhagen. The Copenhagen Accord which is operational immediately, in brief states as follows :

1. To achieve the ultimate objective of the Convention to stabilize greenhouse gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. It sets the goal of limiting global temperature increases to 2 degrees Celsius (3.6 degrees Fahrenheit)
2. Cooperate with each other in achieving the peaking of global and national emissions as soon as possible, recognizing that the time frame for peaking and bearing in mind that social and economic development and poverty eradication are the first and overriding priorities of developing countries and that a low-emission development strategy is indispensable to sustainable development.
3. Developed countries shall provide adequate, predictable and sustainable financial resources, technology and capacity-building to support the implementation of adaptation action in developing countries.
4. Certain nations to commit to implementation of individually or jointly the quantified economy-wide emissions targets for 2020 and thereby further strengthen the emissions reductions initiated by the Kyoto Protocol. Delivery of reductions and financing by developed countries will be measured, reported and verified in accordance with existing and any further guidelines adopted by the Conference of the Parties, and will ensure that accounting of such targets and finance is rigorous, robust and transparent.
5. To enable the mobilization of financial resources from developed countries.
6. Developing countries, especially those with low emitting economies should be provided incentives to continue to develop on a low emission pathway.
7. Scaled up, new and additional, predictable and adequate funding as well as improved access shall be provided to developing countries.
8. To pledge \$30 billion between 2010 and 2012 and \$100 billion a year by 2020 for develop-



ing countries to help adapt to and mitigate the effects of climate change

9. To establish a Technology Mechanism to accelerate technology development and transfer in support of action on adaptation and mitigation that will be guided by a country-driven approach and be based on national circumstances and priorities.

The accord "recognizes" the scientific case for keeping temperature rises to no more than 2C but does not contain commitments to emissions reductions to achieve that goal . As widely expected, all references to 1.5C in past drafts were removed at the last minute; the earlier 2050 goal of reducing global CO2 emissions by 80% was also dropped. The agreement also set up a forestry deal which is hoped would significantly reduce deforestation in return for cash.

The accord was brokered between China, South Africa, India, Brazil and the US. It is not clear whether it would be adopted by all 192 countries in the full plenary session . It disappointed African and other vulnerable countries which had been holding out for deeper emission cuts to hold the global temperature rise to 1.5C this century. It was also opposed by Cuba, Sudan, Nicaragua, Bolivia, Venezuela, Tuvalu, Costa Rica etc. Even the host country showed reservation to the deal. Japan, Norway, and European Union nations came out in support of the proposal.

### The achievements

As climate change is a growing concern for most nations, a lot of hopes were tied to the summit but to the disappointment of all, no grand promises were made at the summit. But it cannot be ruled out as a total disaster either. On certain points Copenhagen Summit marked a new way forward.

Firstly, UN's efforts towards global climate for over a decade now have been plagued by the divide between developed and developing countries. As per Kyoto protocol, only developed countries committed themselves to cutting emissions; developing countries made no such promises. Thus being the main reason as to why Kyoto failed, because America would not accept a treaty that required nothing of countries such as China, and China insisted that the rich world should bear most of the necessary costs of constraining emissions. At Copenhagen developed countries were determined to move beyond this structure; many developing countries to hang on to it. It was the obstacle on which the conference foundered. However the Copenhagen accord made some progress towards reducing this divide. Developing and developed, countries signed up to it, and have agreed to an international role in monitoring any cuts they commit themselves to, which is a vital allowance.

The second reason for hope is that Copenhagen's failure would now encourage the development of political structures better suited to meet the challenge. Climate change is not just a grand problem but is a complex one. It crosses the boundaries which normally define our world; from farming to forestry, shipping to sovereignty, all sorts of interests are brought

together in new ways that demand new actions. The conference has made an impact by bringing along to the negotiating table, other nations which did not sign the Kyoto Protocol agreement. "For instance, America did not sign the agreement but today, America has taken a commitment and has agreed on 17 per cent emission cut." This definitely can be rightly said as the achievement of Copenhagen accord.

### Conclusion

*"The good news is that they're continuing, the bad news is they haven't reached a conclusion"*

French President Nicolas Sarkozy

The Copenhagen climate change conference will no doubt go down in history as one global gathering that generated so much hope and attention from every corner of the earth but was unable to deliver on any of the key issues at stake. Though World leaders rose from the Copenhagen Conference with a political agreement to cooperate in reducing the emission of greenhouse gases, the deal had no binding instrument to ensure its implementation. The only silver lining in all this is that there is a deal in Copenhagen and it has immediate operational effect.

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# PRINCIPLE OF UTI POSSIDETIS AND INTERNATIONAL BORDER CONFLICTS

T

he international boundaries are artificial bifurcations made between the nations by the respective governments or the worthy international organizations. International Boundaries are traditionally made as per the mutual understandings between the concerned state and its neighbours. Economic Patterns, availability of natural resources, human geography are the few vital aspects responsible for the demarcation of boundaries.

There is in existence boundaries wherein the neighbouring Earth masses lie disputed. Israel-Palestine boundary dispute, India-China-Pakistan land dispute are some of the notable boundary disputes wherein the poor (or no) demarcation of boundary has led to numerous conflicts. Many other nations have an established state boundary which has been inherited from the colonial times.

Demarcation of boundaries is done to maintain law and order within the state and maintain a healthy relation with other states. Boundaries enable peace and mutual co-existence among the states. The intention and one of the primary objectives of every state is to maintain peace, which makes it important for the states to establish the boundary. But the rise of disagreement and dispute among the nations is inevitable<sup>1</sup>.

Major boundary conflicts arise mostly in the case of War or International Military tensions between two or more nations. The dominant nation is often seen occupying the other nation's part of land. Indo-Pak boundary and land dispute over Kashmir is one of the most widely known disputes regarding the same.<sup>2</sup>Such a practise wherein the territory remains with the possessor after a conflict/ war is known as the principle of *Uti Possidetis*. It means legalization of the territorial conquest by a nation. Though treaties are an exception wherein the conquest can be controlled and avoided by the other nation in case of a prevalent treaty between the nations. Since treaty is the private law established

between nations on mutual grounds, a country should not breach the signed and ratified treaty.

The principle of *Uti Possidetis* was discussed in the case of Burkina Faso v. Republic of Mali<sup>3</sup> where the International Court of Justice specified that “The principle of *Uti Possidetis* was perceived as a part of Customary International Law, unaffected by the right of self-determination of the people.”<sup>4,5,6.</sup>

The principle of *Uti Possidetis* is also applicable in marine disputes of the similar nature. In the Land, island and Maritime frontier dispute case.<sup>7</sup> The International Court of Justice defined *Uti Possidetis* as –

*“The essence of the principle lies in its preliminary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle uti possidetis resulted in administrative boundaries being transformed into international frontiers in the full sense of the term”<sup>8</sup>*

The principle of *Uti Possidetis* applies only to the in-

ternational boundaries wherein one nation takes into possession the other nation’s particular piece of land. It has been seen as a part of the Customary International Law, as stated before.

Laws are made for maintaining peace and welfare of the people. People should be given the liberty to choose their leader or head, i.e. the state. Since there exist a possession of a state over another, the interest of the public is overlooked and the interest of the nation, which is mostly the government steps and policy is prevailed. The above mentioned cases and dispute arise for the protection of the human interest of the respective state. But due of the reason one

party will win and another will lose as per the conventional dispute resolution means, the interest of the public of the state not winning is infringed.

Also, since the principle literally means "as you possess" usually applicable to situations and circumstances wherein a nation occupies the land (a part) of the other nation after an armed conflict, it will not deter the powerful nation to dominate over the relatively weaker or using the practise of the Big Stick Theory<sup>9</sup> (propounded by Roosevelt). Non-deterrence of the powerful nations from performing undesirable activities (like armed annexation) will be against the interests of the other nation. Also, armed conflict is against the motive of maintenance of Cross-Border/ International Peace.

The International Court of Justice, as mentioned before, has stated that the practise involved under the principle of Uti Possidetis is Customary International Law. It should be understood that the courts contended and stated the above with reference to the Colonial Practise which ended roughly around Mid-Twentieth century. The face of the Earth has completely changed since then and the rules and laws established then or in practise then should be amended and modified accordingly. It should be acknowledged that Colonialism aimed at benefitting oneself on the stake of others. There have been many compositions in the past throwing light on the negative aspects of colonialism. Laws, defined during the period of Colonialism and favouring Colonial activities, should be avoided at all costs.

Welfare of the people and the nations is the paramount objective and purpose of Law. The flaws and outdated principles should be amended and repealed (if necessary). Treaties are a measure of avoiding such conflicts between the nations but treaty making is another herculean task which requires meeting of minds (Consensus) of both the land's governments/ representatives which is difficult to achieve. To achieve international harmony and mutual benefit and co-existence, all the nations should be equally benefitted. Under the principle of Uti Possidetis, only one nation seems to benefit and the other nation's faces loss of territory, affecting the nation as a whole.

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# MORAL RIGHTS

## IN INDIA AND US

Moral rights are the rights of the authors of copyrighted works, generally recognized in civil law jurisdictions, and in some common law jurisdictions. Berne convention was the first of its kind to recognise the moral rights of the authors, and the rights provided therein were influenced by all most all the countries in their legislations on moral rights. The article gives an idea of the relevant legislations on moral rights in India and the U.S, and a significant different between the two.

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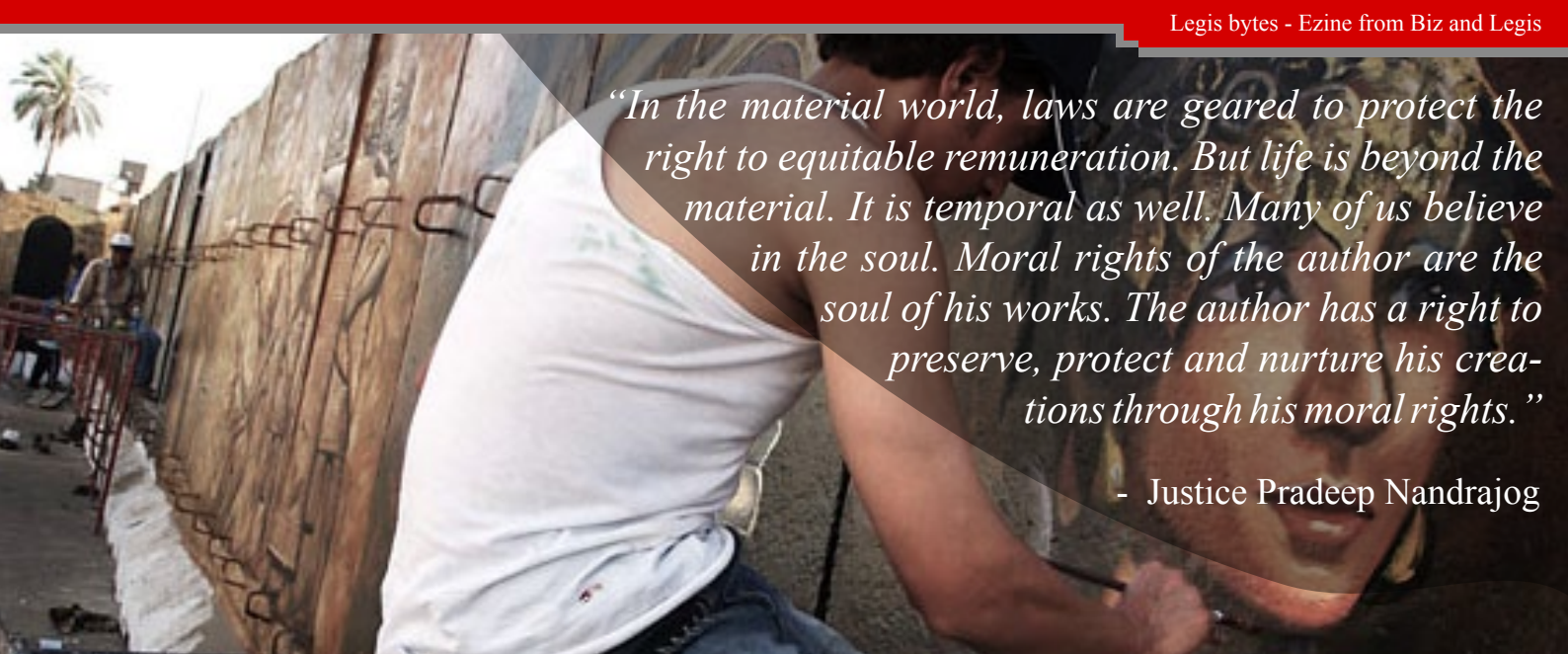
**M**oral rights are the rights given to the creator of a work, which has got a copyright so as to protect their work from alterations or distortions. Moral rights are available to the authors of literary work, dramatic work, musical works, article, and film. Moral Rights contains within its gamut a plethora of rights such as Right of attribution, Right to integrity of work, Right to publish a work and so on and so forth. The artist is entitled to moral rights even if he has assigned his right to a third party .This concept of moral rights differs from the economic rights, that an author has over his works by virtue of copyright protection. In effect, Moral rights act supplementary to the existing economic rights.

### BERNE CONVENTION

The Berne Convention was the first of its kind to grant moral rights to the authors. The Convention is an international agreement which governs copyright, and was first accepted in Berne, Switzerland in 1886. The Convention provides moral rights to the authors which include the right to claim authorship, the right to protect the work from alterations or modifications and also protect the author's reputation.

The moral rights of the author provided in the concerned legislation of different countries are widely influenced by the moral rights prescribed in the Berne Convention, even though some of the signatory countries have widened these rights by providing for additional rights like the right to disclosure (author's final decision on when and where to publish), right to withdraw or retract (right to make necessary changes to the remaining copies after publishing)





*“In the material world, laws are geared to protect the right to equitable remuneration. But life is beyond the material. It is temporal as well. Many of us believe in the soul. Moral rights of the author are the soul of his works. The author has a right to preserve, protect and nurture his creations through his moral rights.”*

- Justice Pradeep Nandrajog

### MORAL RIGHTS IN INDIA

The Indian law recognizes the moral rights of the authors by virtue of section 57 of the Indian Copyright Act 1957. Moral rights are independent of the copyright protection accorded to the authors. Section 57 provides that the authors are entitled to special rights like the right to claim authorship of work, the right to restrain and the right to claim damages at instances of any distortion, mutilation, modification or any other action which can affect the reputation of the author. The legal representative of an author can, along with a claim for authorship of the work, claim the other special rights for which the author is entitled for. The director or producer of a film based on a novel cannot make changes in the story board, without the permission of the author . Publishing of similar books as that of the original books amounts to distortion and mutilation of the work .

The practice, according to Indian law, shows that the moral rights cannot be bought or sold, but they can be waived. The moral rights can be waived only when there is an agreement to that effect stating that the author waives his moral rights. Such an agreement should be in a written form and must possess the reasonable standards. The waiver of moral right is upheld when it is revocable and specifies the alteration or modification. In essence, the Indian law does not permit a blanket waiver of moral rights . The moral rights exist even after the assignment of copyright, either wholly or partially.

### MORAL RIGHTS IN US

In the United States the term moral rights refers to the rights of an author to prevent revision, alteration or distortion of his work. The moral rights are granted to the authors of visual arts under the Visual Artist Rights Act, 1990 . But this Act guarantees moral rights only to creators of tangible arts like painting and sculptures and not to writers, musicians or filmmakers. Moral rights granted herein include the right to claim authorship, the right to prevent the use of the author’s name on any work not created by him, and the right to prevent such distortion, mutilation or modification which can defame the author.

A waiver of the moral rights is permitted by the American Copyright Act provided it is a written agreement specifying the work and precise uses to which the waiver applies.

## CONCLUSION

Nowadays, countries have recognized the need for moral rights as useful means to protect the culture and therefore have included provisions for moral rights in their respective legislations. For instance, in India they are provided for in the Indian Copyright Act, and in US the same is mentioned under the Visual Artists' Rights Act (VARA). Comparing the Indian and U.S laws in relation to moral rights, the fundamental difference we come across is on the scope of the authors who have been granted moral rights. Indian law grants moral rights to authors of all kinds of works including films, dramatic works musical works, whereas in the U.S, the protection of moral rights, as provided by VARA and Copyright Act, is accorded only to those authors, who are indulged in visual art like painting and carving sculptures. However, Indian and U.S laws have the same opinion as to the rights of the authors to waive their moral rights. It can be observed that the U.S laws do not cover moral rights to the extent to which the other nations do. It can also be observed that the U.S laws do not cover moral rights to the extent the other nations do. It can be concluded that moral rights are essential because simply getting a copyright does not protect a work from alterations or mutilations .It is also important because the authors wouldn't wish to share the credits of their work, intending to earn the royalty from his work himself, no one sharing the same.

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# LIMITED LIABILITY PARTNERSHIP ACT, 2008



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Limited Liability Partnership (LLP), is a body corporate, enacted under the Limited Liability Partnership Act 2008, wherein the liability of each of the partners is limited to the contribution willing to be made by each partner. Even after two years after the enactment of the law, a few concerns still persist

## A F E W C O N C E R N S

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### **LIMITED LIABILITY PARTNERSHIP – MEANING:**

A Limited Liability Partnership (LLP) is a form of a business organization or a body corporate, formed under a partnership vehicle in which the liability of the partners is limited to the contribution made/willing to be made by each partner in relation to the LLP. The liability of the partners is limited, except in cases of one's own acts or omissions like frauds, wrongs, malpractices and other illicit activities. In a situation like this, the liability that is attached to that respective partner becomes unlimited.

The Limited Liability Partnership Act provides for the partnerships to be incorporated as persons, which gives it a separate legal entity and perpetual succession. Whereas, the partnerships incorporated under the Indian Partnership Act, 1932 do not enjoy a separate legal entity status, as they are not incorporated as persons and do not enjoy perpetual succession.

Limited Liability Partnerships in India are divergent from the LLPs in different countries. In a few countries, the provisions may allow all the investors of the LLP partner to be passive as a Limited Liability patron, and one of them to hold unlimited liability. This may be suitable for businesses where all the patrons take an active role in running the production. Whereas

in India, the liability of all the partners are limited to the extent they wish to contribute.

It can be seen that the Limited Liability Partnership (LLP) Act, 2008 is mainly based on the Singapore LLP Act and it also does includes a few highlights from the United Kingdom LLP Act.

### **LEGISLATIVE HISTORY IN INDIA:**

Since the middle of the twentieth century, there has been emphasis and debates on the question of having a separate legislation made for the Limited Liability Partnership structure and to introduce a new corporate structure for small and medium sized business entities.

The first ever suggestion in this regard was made by the Iron, Steel and Hardware Merchants Chamber. Later, it was the First Law Commission of India in the year 1957, which rejected this suggestion, when it released the seventh report on the Indian Partnerships Act, 1932 saying that the amendments it made to the Indian Companies Act, 1956 would become meaningless, if LLPs were introduced. Forty years later in 1997, Abid Hussain Committee's Report on small scale industries recommended the introduction of the concept of LLPs in India. Subsequently to that, Naresh Chandra Committee Report on the Regulation of Private Companies and Partnerships and Dr. JJ Irani Expert Committee on Company Law in 2003 and 2005 respectively, strongly recommended the introduction of LLPs. Following that, Dr. JJ Irani Committee suggested that small enterprises should be included in the scope of LLPs and that there should be a separate LLP Act.

Later, in the course of time, the Parliament and the Union Cabinet approved the Limited Liability Partnership Bill and on January 9, 2009 LLP Act 2008 was published in the official gazette of India.

### **A FEW CONCERNS:**

The Limited Liability Partnership Act, 2008, provides for unlimited liability partnership firms and companies to convert into LLPs. In case if any of these companies or unlimited liability partnership firms wish to convert back into their original form, there is absolutely no provision, neither in the LLP Act and nor in any the other Acts which provide for re-conversion of these entities.

Also, one of the key conditions for the conversion of a private limited company or an unlisted public limited company into an LLP is that these kinds of companies can convert into LLPs only if there are no security interests existing on the assets of these entities. However, it is

difficult for most of the private limited and unlisted public limited companies to be in a position, whereby there exists no security interests on their assets. Once the conversion into an LLP is done, the assets of the particular entity rests only with the LLP. In such a situation, the existence of this clause becomes questionable. This provision restricts the opening of a convertibility option to many private limited and unlisted public limited companies who wish to convert themselves into an LLP.

The Limited Liability Partnership Act, in Section 71, states that the provisions in the present Limited Liability Partnerships Act shall be in addition to and not in derogation of the

provisions of any other law for the time being in force. Therefore, any professional person, for instance a lawyer, while reading this provision, will need to consider the provisions of other statutes and laws governing professionals to settle over the thought, as to whether they could make any benefit out of the limited liability partnership.



If we take a look at a statute governing professionals, say the Advocates Act 1949, provides that only an Advocate can appear in front of a Court. As a firm is not a person in the eyes of law, a partnership firm is permitted to appear before a Court. But, under the LLP Act, where an LLP has a separate legal entity and which is seen as a person in the eyes of law with perpetual succession, it becomes difficult to distinguish how an LLP can be determined as a firm under the provisions of the said Advocates Act, that could be recognized as having a right to practice in a Court.

Talking about the filing of accounts, the LLP Act states that an LLP should file its accounts with the Registrar. This might turn out to be difficult and unacceptable to a variety of professional LLPs like legal firms or chartered accountant firms, etc. as the accounts of a firm are a private affair and the only exception that is given is for the disclosure which has to be made by the firms to the taxing authorities.

Generally, before providing any loan or a credit to a person or a firm, a lender or in other cases a contracting party obtains guarantees from the partners as a precondition. In the Limited Liability Partnership Act, Section 27 (4) states that the liabilities of the limited liability partnership shall be met out of the property of the limited liability partnership. This section poses a question in the minds of the contracting parties if it becomes a bar to obtain a guarantee, as a precondition from the partners for providing a loan and so on. As it can be seen, the guarantee arises from the contract itself, which would not bar the application of such an opinion. But then, this is a particular law that expressly states that the liability of the Limited Liability Partnership is to be met out of the LLP's assets. Therefore, once again the principle of guarantee becomes questionable.

The Indian Partnerships Act, 1932 provides for minors to be a partner of a partnership firm where they are admitted to the benefits of the partnership. But the Limited Liability Partnership Act, 2008 is completely silent on the issue of admission of minors as a partner into the LLP. An appealing question arises here, that if the formation of an LLP is done through a contract, should the provisions of the Indian Contract Act made applicable here? The Contract Act provides that minors cannot be a contracting party.

Coming to the point of oppression and mismanagement, the Indian Companies Act provides for highly structured redressal solutions for oppression of minority share holders. But again the LLP Act is silent in addressing the issue of oppression of partners who contribute just a smaller amount of the capital.

One of the focal issues that arose when the bill for limited liability partnerships was proposed was that small time/ small scale Limited Liability Partnerships should not be permitted to be formed, as they could be a threat by undermining the credibility of the concept of limited liability partnership. At that point of time, the Naresh Chandra committee had suggested that there should be an exclusive provision for compulsory insurance under the LLP Act. But later, that proposal had disappeared with time.

### **CONCLUSION:**

The amalgamation of the Indian Partnership Act and the Indian Companies Act is highly innovative and fascinating. The hybrid structure of the LLP Act which combines the organizational flexibility of a general partnership and the benefits of the limited liability concept of an incorporated company is highly likely to attract many small and medium sized industrialists and entrepreneurs, service sector businessmen and professionals to set up limited liability partnerships in India. The concept and composition is also likely to advance the effectiveness of Indian ventures and smoothen the progress of an increased involvement of the Indian service industry in the international scenario. Even the issues that arise are not irresolvable. The LLP Act is, no doubt, a step towards the better direction.

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