

A Comparative Analysis of the Recent Family Law Reforms in Australia and India: Domestic Violence and Property Division

Executive Summary

This article is the first of its kind to compare the law and law reform on the division of property in matrimonial and family law disputes across two countries and three cultures.

Expert lawyers from Goldman & Co, qualified in India and Australia respectively, Ms. Ekta Jhanjhri (India) and Mr. Jaswinder Sekhon (Australia) provide a sharp comparative analysis with the aim of pushing and developing fruitful ideas for reform and jurisprudential thought on what is possible.

Introduction

Family law reforms addressing domestic violence and property division have become increasingly significant in contemporary legal discourse. Australia's recent amendments to Section 79(5) of the **Family Law Act 1975 (Cth)** via the Family Law Amendment Act 2024 now explicitly consider family violence and its impact on one party's circumstances during property settlements.

Similarly, property division laws in India under **Hindu Marriage Act, 1955, Muslim Personal Law**, and related statutes reflect distinctive cultural, religious, and historical underpinnings. This article provides a detailed comparison of these frameworks, emphasizing the new Australian provisions' focus on family violence and contrasting them with India's Hindu and Muslim matrimonial property division laws.

Australia: The New Section 79(5)

Australia's family law recognizes the unequal impact domestic violence can have on a spouse's financial standing. Such recognition is unique amongst common law countries in as far as it is legislatively enacted and mandated as a factor to be taken into account when dividing matrimonial property.

Prior to the reforms, Australian family law looked at financial and non-financial contributions and the future needs of the parties. Australia has now mandated that the Courts look at the financial value of the impact of domestic violence and wastage. Domestic violence will also include mental violence that may occur from oral threats and not just physical violent acts that may occur during a marriage or relationship.

The amendments to Section 79 and the insertion of a new sub-section (5) enhance judicial discretion by directing courts to consider family violence in property divisions, alongside other statutory factors such as financial contributions and future needs.

Key Features of the Amended Section 79(5)

The revised section explicitly addresses:

1. **Family violence:** Courts now evaluate the effects of family violence on the victim's **current and future circumstances**.
2. **Material wastage:** Intentional or reckless dissipation of property or financial resources caused by a party which belongs to either of them, including in contexts of coercive control or abuse.
3. **Future needs and health:** The mental and physical toll of abuse is accounted for when assessing a victim's capacity for gainful employment or self-support.

These changes align with judicial recognition of family violence's long-term impacts, including economic abuse, as demonstrated in cases such as **Kennon v Kennon (1997) 22 Fam LR 1**, which highlighted that family violence could diminish the victim's contributions to the marital estate or have made a party's contributions significantly more arduous than they ought to have been,.

India: Matrimonial Property Division

In India, matrimonial property division remains primarily governed by religious personal laws. The laws for Hindus and Muslims showcase stark contrasts, with Hindu law increasingly codified and equitable, while Muslim law adheres more closely to traditional doctrines.

Hindu Marriages and Property Division

Under the **Hindu Marriage Act, 1955**, there is no specific statutory provision for marital property division akin to Australia's Section 79. Instead, property rights derive from ancillary proceedings, including maintenance awards under Section 24, 25 and partition of joint family property under the **Hindu Succession Act, 1956**.

1. **Judicial Precedents and Alimony:** Indian courts increasingly recognize a wife's contribution to household work as a basis for equitable distribution of property. For instance, in *Kannain Naidu vs Kamsala Ammal 2023 SCC OnLine Mad 4077*, the Madras High Court acknowledged the lack of legal basis in recognising the contribution made by a wife. Nonetheless, the Court in that case acknowledged the wife's direct or indirect contributions to the husband's purchase of the properties, not only in monetary terms but also in non-monetary forms such as aintaining the home and taking family care. There is no legislation that precludes the judges from acknowledging the contributions made by a wife who helps her husband to buy a property by performing household chores. Therefore, in the opinion of the Judge, both spouses are unquestionably entitled to an equal share in assets if they are acquired through a combined contribution (directly or indirectly) for the family's well-being.
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2. **Legislative Gaps:** Unlike Australia, Indian law does not explicitly address the impact of domestic violence on property division. However, remedies under the **Protection of Women from Domestic Violence Act, 2005 (PWDVA)** allow for residence rights and protection orders, indirectly affecting property-related disputes.

Muslim Marriages and Property Division

1. The property rights in Muslim marriages have undergone significant developments. The women's right to maintenance were originally governed by the Muslim Personal Law pursuant to the **Muslim Personal Law (Shariat) Application Act, 1937**. Each spouse retains individual ownership of their respective property during and after marriage. The concept of shared marital property is absent.
2. As per the Muslim Personal Law, a Muslim woman is entitled to maintenance from her husband till the period of *Iddat* only. *Iddat* is a period, usually of three months, which a woman must observe after the death of her husband or a divorce before she can remarry. In other words, a woman was not entitled to maintenance after the expiry of *Iddat* period,
3. This issue came before the Supreme Court in the case of *Mohd. Ahmed Khan vs Shah Bano Begum and Ors* 1985 AIR 945, wherein the wife claimed maintenance under section 125 of the **Code of Criminal Procedure, 1973 (CrPC)**. The Supreme Court upheld wife's contention and bridged the gaps by granting maintenance under section 125 of the CrPC, which is a secular statute, conferring the right upon the dependent wife to claim maintenance from her husband having sufficient means.
4. In response to the Shah Bano Begum case, there was enacted *Muslim Women (Protection of Rights on Divorce) Act*, 1986, which formally recognised the right of Muslim women to get back *Mehr* (Dower). *Mehr* is a contractual obligation under Islamic law which Mehr provides financial security to the wife, and is given to the husband at the time of marriage. However, Mehr does not equate to equitable division, and is to be returned by the husband at the time of divorce. This legislation also facilitated the mechanism for Muslim women to obtain a court order for maintenance for period beyond the *Iddat* period.

Comparative Analysis: Domestic Violence and Property Division

Recognition of Domestic Violence

- **Australia:** Explicit consideration of family violence in the new Section 79(5) marks a progressive step, acknowledging its multifaceted impact on victims. Courts weigh both financial and non-financial contributions of the victim against the abusive party's actions, reflecting an intersectional understanding of domestic violence.
 - **India:** Domestic violence legislation (PWDVA) grants civil remedies like residence orders but does not integrate these considerations into broader property division laws. While protective mechanisms exist, there is no direct link to matrimonial property rights.
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Approach to Property Division

- **Australia:** Australia adopts a discretionary approach, balancing contributions, needs, and the impact of abuse. The amendments enhance fairness by mitigating the economic consequences of violence on victims.
- **India:** India, however, retains a more rigid framework influenced by religious laws. Hindu law has evolved towards equity, particularly through judicial activism, while Muslim law remains rooted in separate property regimes, offering limited recourse for victims of domestic violence in property matters. Unlike Australia, there does not exist a scientific approach to property division in India, be it under Hindu Law and Muslim Law. The factors which the courts consider in granting maintenance awards have not been explicitly coded in the legislation and must be pulled from judicial precedents, which makes the exercise even more arduous.

Gender Equity and Economic Justice

- **Australia:** The reforms aim to level the playing field, addressing gendered impacts of domestic violence. Victims, predominantly women, gain recognition for their diminished financial and employment prospects due to abuse.
- **India:** Women face systemic disadvantages under both Hindu and Muslim laws. Though judicial intervention has improved outcomes, codified laws remain inadequate in ensuring gender equity, particularly in the absence of shared marital property doctrines.

Policy Implications and Recommendations

Australia

The Section 79(5) amendments represent a laudable shift towards addressing family violence in property divisions. However, implementation challenges persist:

- **Evidentiary Burdens:** Victims must substantiate claims of domestic violence and its economic impact, requiring robust legal and counselling support.
- **Judicial Training:** Enhanced training for judges on the nuanced dynamics of domestic violence is essential to ensure consistent application of the law.

India

India's fragmented legal framework necessitates comprehensive reform:

1. **Uniform Civil Code (UCC):** Advocates argue for a UCC to harmonize property division laws across religious communities, promoting gender equity.
2. **Statutory Reform:** Enacting a **Marital Property Act** to codify shared ownership and consider domestic violence's impact on economic disparities.

3. **Expanded Scope of PWDVA:** Amendments should integrate property division considerations to provide holistic remedies for domestic violence victims.
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Conclusion

Australia's reforms under Section 79(5) underscore a progressive acknowledgment of the pervasive impact of domestic violence on financial outcomes in marital property divisions. By contrast, India's matrimonial property laws, while evolving, still lack a unified and equitable approach, particularly in addressing domestic violence's economic ramifications.

Whilst the journey of initiating the dialogue, suggesting amendments and finalising the reforms is a lengthy, it is recommended that we understand the evolution that Australian law has undergone in the past 30 years and adopt their approach with necessary modifications that may be applicable in an Indian cultural scenario; however with the aim recognising not only that there is unequal bargaining power in many matrimonial relationships, but also the part that mental and physical pressure, coercion or violence may play in determining what is a fair and equitable property division process.

Such a process is critical not only for equality in individual rights before the law but one that considers the changing social expectations of both parties in a matrimonial relationship and how to resolve issues fairly and transparently when such relationships are being dissolved.

References

1. Family Law Act 1975 (Cth) (Australia).
2. Family Law Amendment Act 2024 (Cth) (Australia)
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