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**PRENUPTIAL AGREEMENTS IN INDIA***~Utkarsh Saxena<sup>1</sup>***Abstract**

*The definition and the way people look at marriages have changed over time. People have introduced concepts of divorce and remarriage to religions such as Hinduism and Christianity. The introduction of divorce has led to the introduction of the concept of Prenuptial Agreements. This paper aims to understand what prenuptial agreements are and how they work. The paper goes in-depth about how these agreements work and how they can be implemented in the modern world. The paper, with the help of case laws, proves that these agreements would help modernize marriage laws and help in better protecting both parties in and after a divorce. The paper enforces the idea that Prenuptial Agreements are vital to marriages and discusses how these agreements can be implemented legally through family laws. The paper also briefly discusses the state of prenuptial agreements around the world and compares it to the situation with Indian Family Laws.*

**Keywords**

*Marriage, Prenuptial Agreements, Domestic Agreement, Family Law, Divorce*

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## **INTRODUCTION**

In most religions throughout history, marriage has been considered a sacrament, a bond between 2 people, a man and a woman, for life. For example, Hindu Marriages have numerous processions and rituals that a couple must undergo to sanctify their marriage. Even in Christianity, the wife of a man is considered to be one of his flesh and bone.

However, the way people look at marriages has changed over time. Any religion, albeit Hindu, Christian, or Muslim marriage, has changed their definition of marriage for the modern world. The concepts of divorce, prenuptial agreements, and remarriage, which were previously banned as they were considered wrong and sacrilegious, were introduced to these marriages. The Codification of Laws for Marriages has made marriages both a contract and a sacrament. Laws have defined customs and have also added the concepts mentioned earlier, such as the concept of divorce. The introduction of divorce laws has also introduced new laws that ensure a woman's safety after the divorce through divorce and maintenance acts.

Prenuptial Agreements, in other countries, are another concept introduced after the introduction of Divorce Laws. Prenuptial Agreements are written contracts, made by a wife and a husband before the marriage, that comes into effect in case of a divorce. The contract decides the division of shared assets, such as money in a joint savings account and property, alimony, and maintenance after the divorce, and the amount of child support to be paid if the couple were to have children after the said couple file for a divorce. The purpose of these agreements is to protect both parties of the divorce from loss of money or property and ensure the wife's maintenance, after divorce, to aid her in her future opportunities.

This paper aims to describe Prenuptial Agreements and discusses the validity of these contracts in various countries. The paper, with the help of case laws, explains the need for such agreements and how they have been used indirectly in some cases. The paper also briefly discusses prenuptial agreement laws that are present in other countries and compares the state of Indian Family Laws when it comes to prenuptial agreements.

## **RESEARCH OBJECTIVES**

Throughout this paper, the concept of prenuptial agreements will be understood. With the help of case laws and landmark judgments, the paper will show the importance of such agreements for a

marriage. The paper will shed light as to how these agreements are or would be implemented in different marriage laws, such as the Hindu Marriage Act, Christian Marriage Act, or Muslim laws. The paper will also briefly go over the legal status of Prenuptial Agreements across the world and compare it to the status of these agreements in Indian Family Laws. The paper also suggests how these laws could be implemented and how they could modernize Indian family laws.

## ANALYSIS

The rising number of Indian women who want husbands and wives to share caregiving and household responsibilities shows that the country's rapid modernization makes it more probable than ever for women to revolt against outdated notions.<sup>2</sup> Divorce has less of a stigma because of modernization, women's financial and intellectual freedom, and changing perspectives on marriage.<sup>3</sup> As a result, the divorce rate has rapidly risen from 1 in 1000 individuals ten years ago to about 13 in 1000 people now.<sup>4</sup> Couples who are divorcing could spend a lot of time and money arguing in court over issues like asset division, maintenance, and child custody. This occurs as a result of the emotional and monetary expenses of divorce.<sup>5</sup> Even if it wasn't anticipated at the time of forging a marital connection, divorce is a possibility in modern society and should be taken into account by couples wanting to be married. Prenuptial agreements may be quite useful in this regard for planning beforehand for such a circumstance, should it inevitably arise. The obligations of the spouses throughout the marriage and after it ends are laid out in the negotiated agreements.

Before talking about the status of prenuptial agreements in India we need to discuss its validity in different religions and validity in different countries.

## PRENUPS IN DIFFERENT RELIGIONS

Marriages in Islam are considered as a contract known as Nikah–Nama. Details like the couple's living arrangements, whether the husband will have a second wife or not, and if the first wife needs

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<sup>2</sup> Reeta Sonawat, Understanding Families in India: A Reflection of Societal Changes, 17(2) TEORIA E PESQUISA (2001).

<sup>3</sup> Anand Giridharadas, With India's New Affluence Comes the Divorce Generation, N. Y. TIMES, Feb 19, 2008, <http://www.nytimes.com/2008/02/19/world/asia/19iht-divorce.110178712html> (Last visited on June 10, 2019).

<sup>4</sup> Divorce Rate in India Increasing, January 9, 2017, <http://marriagelane.com/divorce-rate-in-indiaincreasing/> (Last visited on June 14, 2019).

<sup>5</sup> Vijender Kumar, Matrimonial Property Law in India: Need of the Hour, 57 JILI (2015) 500.

consent must all be included in the contract. Another essential component of marriage in Islam is giving the bride a "mahr" before the union. If the husband passes away or the couple eventually chooses to divorce, the mahr serves as the wife's financial safety net. In the case of a divorce, the lady is free to choose whether or not to return the mahr. The mahr is given to either the bride or the bride's father.

In Jewish marriages, an important part of the whole wedding process is the Ketubah contract. It includes the husband's obligation to help his wife by providing for her needs such as food, clothing, and shelter, much like the Nikah–Nama of Muslims.

In Christian marriages, marriages are considered for a lifetime, and husband and wife are considered to be one flesh. That is why there is no concept of Prenups in Christian marriages.

In Hinduism, the view on prenups is a lot similar to Christianity. In both religions, it is considered holy. And in both religions, it is not a contract. Hindu marriages have not the slightest shred of faith that it may end before the lovers' lives. The belief also asserts that Gods have spouses who emphasize the value of being together until death separates them. Hindu weddings have not altered much throughout the years since most aspects of contemporary society have been ongoing for a very long time. As a consequence, Hinduism's marriage practices have not changed as a result of current events that have given us a new perspective on weddings.

## **PRENUPS IN DIFFERENT COUNTRIES**

Historically, prenuptial agreements have not been seen as legally binding contracts under English law.<sup>6</sup> The Matrimonial Causes Act, 1973 delegates authority to the courts, allowing them to decide on supplementary remedies relating to spousal property ownership agreements, maintenance payments, the transfer of pensions, and the award of financial directions in the case of a breakup of marriage.<sup>7</sup>

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<sup>6</sup> Law Commission (United Kingdom), Matrimonial Property Agreements, Consultation Paper No. 198, Part 4 (2011).

<sup>7</sup> Matrimonial Causes Act, 1973, §§21-25 (United Kingdom).

The situation in the United States of America may be characterized as being rather steady in this respect. Although the contents of the agreements and the procedures that must be followed differ from state to state, prenuptial agreements are enforceable in all fifty states of the union.<sup>8</sup>

Contrary to the American method, where the Divorce Act, 1985 requires that such arrangements be honored, premarital agreements are taken into account following a divorce, such as when determining the amount of child support or spousal support to be paid.<sup>9</sup> Prenuptial agreements are often recognized by Canadian courts in matters involving child custody in the event of divorce, provided that they are in the child's best interests. In addition, courts often respect the terms of agreements related to the division of property between potential spouses, even though community property law controls the equitable distribution of assets in all Canadian provinces.<sup>10</sup>

It's crucial to remember that Canadian states have made an effort to achieve a balance when it comes to prenuptial agreements' legality. It is important to recognize that British Columbia courts have the jurisdiction to divide assets equitably even when there is a valid marriage contract.<sup>11</sup>

Turkey is a secular country with a 99 percent nominal Muslim population.<sup>12</sup> The constitution guarantees both religious freedom and toleration in Turkey, which does not have a state religion.<sup>13</sup> Turkish civil law permits premarital agreements that address marital property. Turkish law's marital asset system, which may either be a contractual asset regime or a legal asset regime, governs how assets are divided in the event of a separation or divorce.<sup>14</sup>

## LEGAL PROVISIONS

Pre-nuptial agreements, also referred to as pre-marital contracts are a form of domestic agreement between spouses, persons who may prospectively become spouses, or individuals who are in a live-in relationship. These contracts attempt to establish the procedure that the parties to the

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<sup>8</sup> Amberlynn Curry, *The Uniform Premarital Agreement Act and its Variations throughout the States*, 23 JAAML 355, 356(2010).

<sup>9</sup> Divorce Act, R.S.C. 1985, 15.2(4) (Canada).

<sup>10</sup> Family Law Act, R.S.O. 1990, c.F3, §52 (Canada).

<sup>11</sup> Family Law Act, SBC-2011, Ch.25, §93 (Canada).

<sup>12</sup> Harvard Divinity School, *Islam in Turkey*, RELIGIOUS LITERACY PROJECT, available at <https://rlp.hds.harvard.edu/faq/islam-turkey> (Last visited on June 18, 2019)

<sup>13</sup> Bureau of Democracy, Human Rights and Labor, U.S. Department of State, *Turkey— International Religious Freedom Report 2004*, available at <https://www.state.gov/j/drl/rls/irf/2004/35489.htm> (Last visited on June 20, 2019).

<sup>14</sup> Z.D. Tarman & B. Başoğlu, *Matrimonial property regime in Turkey*, 3 BUITENLANDS IPR / FOREIGN PIL 357-363 (2014).

contract will follow to find a solution to any issue that may arise at the end of the marital relationship between the two parties. A pre-nuptial agreement is a contract that is signed by the soon-to-be-married couple before marriage, and which provides the parties with a legal medium to decide on issues such as maintenance and the division of assets, including any property that may be acquired by either of the parties at the time of marriage. This is the definition of prenuptial agreements as accepted by countries where they are legally binding. The Indian marital system is, however, distinct from the nuptial laws being practiced in Western countries such as Canada, the United States of America, and countries in Europe. Marriage in India is considered primarily a sacrament rather than a legally binding contract between two parties. The Indian standpoint is that agreements that seek to contemplate the probable separation of a married couple such as the one set out in a pre-nuptial agreement, are viewed as being in opposition to public policy. Hindu marriage in particular, is sacramental wherein it is viewed as a religious bond in which a man and woman are bound together by holy matrimony for their physical, spiritual, and social needs for Dharma, procreation, and pleasure. Hindu marriage is often displayed as an enduring bond between the husband and wife, and the bond has the characteristic of permanency and remains intact even after the death of the parties involved. In the case of “*Shivonandh v. Bhagawanthumma*”<sup>15</sup>, the Court held that the parties to a Hindu marriage are bound to each other for life, the reason being that a marriage performed by conducting the ceremony of ‘*Saptapadi*’ before a holy fire was a union of such religious value that it could not be untied. However, the judgment passed by the Allahabad High Court in the case of “*Bhagwati Saran Singh v. Parmeswari Nandar Singh*”<sup>16</sup> stated that while Hindu marriage remains sacramental, it is also a civil contract that is entered into by the marrying parties.

Under Section 23<sup>17</sup> of the Indian Contract Act, 1872, an agreement cannot be said to have a lawful object if its functioning is against the public policy being followed. In the landmark judgment of “*ONGC V. Saw Pipes Ltd.*”<sup>18</sup> The Court provided a broader definition of the scope of public policy, which stated that any contract which may tend to prove injurious to the interests and welfare of the public can be considered as being in opposition to public policy. The Indian Contract Act also prohibits contracts that allow the parties to an agreement to be in consensus over voluntarily

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<sup>15</sup> Shivonandh v. Bhagawanthumma, AIR (1962) Mad. 400.

<sup>16</sup> Bhagwati Saran Singh v. Parmeswari Nandar Singh, 1942 ILR All 518.

<sup>17</sup> The Indian Contract Act, 1872 § 23, No. 9, Acts of Parliament, 1872 (India).

<sup>18</sup> ONGC V. Saw Pipes Ltd., AIR (2003) SC 2629.



waiving their rights which are conferred upon them by the various personal laws that govern matters such as marriage, inheritance, divorce, adoption, etc. Under the current judicial system in India, pre-nuptial agreements have no enforceability in an Indian court of law, and such contracts merely serve to provide persuasive value, in that they showcase to the courts the intention of the parties while entering into the sanctity of marriage, with regards to issues regarding alimony, division of assets owned by the married couple as well as custodial rights over any children that the couple may have, at the time of divorce proceedings. In the case of *“Krishna Aiyar v. Balammal”*<sup>19</sup>, the Court held an agreement wherein the husband was obligated to pay the wife a certain amount of money if she chose to leave from cohabitation with her husband. The Madras High Court opined that such an agreement is in contravention of public policy, as well as being prohibited by Hindu law, and was therefore unenforceable. The court has the authority to take into consideration the pre-marital agreement and may even allow it to influence the decision of the court while passing a judgment, but in no way is the court bound by the contents of the pre-nuptial agreement. In the case of *“Sunita Devendra Deshprabhu v. Sitadevi Deshprabhu”*<sup>20</sup>, a prenuptial agreement entered into by the married couple was one of the documents considered by the Court at the time of divorce while adjudicating on the matter of the division of assets between the parties.

A pre-nuptial agreement under Muslim personal law exists in the form of *‘Nikahnama’*, which is a contract of marriage that provides documentation of all the pertinent details about a matrimonial alliance between any two persons. This agreement contains mention of the name of the bride and groom, their personal as well as familial details, information concerning their economic and financial status, as well as specifying the mahr, which is also known as dower, that serves as a form of consideration which has to be paid by the groom to the bride. The contract also contains details about the time of marriage and any other relevant factors that are of pertinence to the union between the two parties.

The nature of Muslim marriage is that of a civil contract between a husband and wife, given that it is entered into by both parties with free consent given of their own volition. There is also a present offer and acceptance of the proposal of marriage, which is referred to as *“Ijab e Qabool”*.

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<sup>19</sup> Krishna Aiyar v. Balammal, (1911) ILR 34 Mad 398.

<sup>20</sup> Sunita Devendra Deshprabhu v. Sitadevi Deshprabhu, (2016) 6 Bom CR 567.

In the case of *“Itwari v. Asghari”*<sup>21</sup>, the Allahabad High Court stated that a marriage between Mohammedans is a civil contract.

It is also important to note that while Muslim marriage is primarily viewed as a civil contract, certain sects treat it as having religious and sacred value. A ‘*Nikahnama*’ acts as a written form of the contract of marriage and performs the role of providing proof of marriage. It is utilized as a medium to resolve any issues that may arise out of, or at the end of a marriage. It provides a safeguard to the wife in the form of ‘*mahr*’ which serves as an economic protection to the bride in her new marital home. In the case of *“Abdul Moin vs Mst. Rafia Bano”*<sup>22</sup> the court held that provided that there is consensus, either the bride or the groom can present contract conditions which may gain legal enforceability concerning the conditions of the marriage between the two parties. In the year 2005, the All-India Muslim Personal Law Board first passed a voluntary set of guidelines for a model *Nikahnama*, but this model does not serve to have any binding effect.

The closest provision presented in the Indian legal system with regards to specifying the law on prenuptial agreements within personal laws has been mentioned under Section 40<sup>23</sup> of The Divorce Act, 1869, under which the District Court has the authority to enquire into the presence of any ante-nuptial or post-nuptial agreements between the married couple before passing a decree for dissolution of marriage. In a Christian marriage, a pre-nuptial agreement entered into by the involved parties may be considered by the court while adjudicating on the matter of asset distribution.

In India, the only State where pre-nuptial agreements are valid in the State of Goa, where, under the Portuguese Civil Code, 1867, which has applicability only in the State of Goa, a married couple is required to register any and every property owned by each member before the marital ceremonies and the consummation of marriage. The parties can also establish their entitlement over said properties and in a scenario where the couple gets divorced, the parties to the pre-nuptial agreement can get a hold of their properties without any dispute.

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<sup>21</sup> *Itwari v. Asghari*, AIR (1960) All 684.

<sup>22</sup> *Abdul Moin vs Mst. Rafia Bano*, 2014 (05) Suit No. 125/2012.

<sup>23</sup> The Divorce Act, 1869 § 40, No. 4, Acts of Parliament, 1869 (India).

## CONCLUSION

The current research paper is about the legal validity of prenuptial agreements in India. This paper attempts to present the readers with the current legal standing of pre-nuptial agreements in India in various personal laws, namely those of the Hindu religion, Islamic law, and Christianity. These personal laws have exclusive jurisdiction on issues of marital and family law. The Hindu personal laws state that marriage between two Hindus is a sacrament with a bond enduring between man and wife for eternity rather than a legally binding contract. In Islamic law, the nature of marriage between man and wife is that of a civil contract, and an agreement called a '*Nikahnama*' is signed between the marrying parties before the marriage. Under Christian law, the court may take into consideration, at its discretion, any pre-marital contract existing between the married couple at the dissolution of the marriage.

The validity of pre-nuptial agreements in India should be re-considered with a special focus on Hindu personal laws given the advantages they bring to the table. Issues of maintenance, custody disputes, and separation receive speedy resolution. A premarital contract also serves to protect the parties to the contract from any exploitation, while also securing financial security for both parties if the marriage should fail. All in all, a prenup serves to reduce the chances of conflict between the married couple and leads to a sense of understanding between the two parties.