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## **PRENUPTIAL AGREEMENTS – An Analysis**

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### **ABSTRACT :**

Under Roman law, the principle “Hominium causa jus constitutum est” translates to “all laws are established for the benefit of individuals or to serve the welfare of mankind.”<sup>1</sup> This concept is particularly evident in the context of prenuptial agreements, which are widely recognized as effective tools for defining the rights and obligations of spouses both during the marriage and in the event of its dissolution. Prenuptial agreements are entered into voluntarily by both parties, free from undue influence, prior to their marriage. Each individual typically has the opportunity to seek advice from an independent legal advisor before committing to the terms. These agreements serve to formally record the parties' rights and responsibilities, providing an equitable platform for negotiating the terms and conditions. Furthermore, prenuptial contracts are instrumental in safeguarding personal assets and properties owned before the marriage. They also protect against liabilities such as individual debts, obligations related to family businesses, and other financial risks. These agreements have emerged as increasingly popular tools worldwide for defining the rights and responsibilities of spouses both during marriage and in the event of its dissolution. However, India's legal stance on such agreements remains notably hesitant. The country's approach to prenuptial agreements is best described as distinctively uncertain. For instance, the Nikah-Nama, a form of prenuptial agreement, is an integral component of Muslim marriages in India, while prenuptial considerations also play a recognized role in decisions related to the dissolution of Christian marriages. Conversely, for other religious groups, the enforceability of prenuptial agreements often depends on judicial interpretation. Marriage, as one of the oldest societal institutions, serves as the cornerstone of civilization and collective well-being. Across various personal laws, marriage is understood differently, ranging from a sacred bond to a contractual arrangement. In India, marriage has traditionally held a sacramental status, both in practice and philosophy. Nonetheless, with the progression of societal norms, the outmoded concept of marriage is undergoing transformation. Importantly, contemporary discussions about prenuptial agreements in India have been heavily influenced by societal viewpoints, often at the expense of considering the perspectives of the individuals directly involved. This paper seeks to refocus attention on the primary stakeholders—couples—by evaluating how prenuptial agreements can benefit them and by proposing frameworks for such agreements that prospective spouses might adopt to navigate and manage their marital relationships effectively.

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### **Introduction :**

Marriage is one of the oldest and most widely recognized social institutions across the globe. It is deeply embedded in societal norms and traditions, often upheld through various religious ceremonies that reinforce the family structure. This bond is generally intended to last a lifetime, unless dissolved by mutual consent or through legal annulment.

As a cornerstone of society, marriage serves as the foundational framework upon which civilizations thrive and prosper. It is often regarded as a sacred union where both partners commit to mutual respect, cooperation, and support. “Historically, marriage has been understood as a legal bond between a man and a woman, formed to fulfill mutual responsibilities and obligations towards one another and society, grounded in the distinction between genders and the duties that come with it.”<sup>2</sup>

In contemporary society, marriage is often no longer viewed as a sacred institution but rather as a practical arrangement influenced by individual choices and evolving norms. The traditional status of marriage appears to be waning, with a noticeable decline in the number of marriages, a trend toward later marriages, and a growing acceptance of alternative relationship models such as cohabitation.

This shift reflects a broader transformation in societal attitudes, granting individuals greater freedom to determine their own relationship trajectories. Despite these changes, marriage continues to hold deep symbolic significance for many people.

In an era marked by trust issues and an increased emphasis on selecting the right partner, combined with rising divorce rates, there is a noticeable trend toward the use of prenuptial agreements. These agreements are becoming increasingly popular, particularly among younger couples, as they seek to safeguard their assets and establish clear terms in the event their marital relationship comes to an end.<sup>3</sup>

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<sup>1</sup> AnvesakArticle.pdf

<sup>2</sup> Black's Law Dictionary, 1990

<sup>3</sup> [https://www.huffpost.com/entry/prenups\\_n\\_4145551](https://www.huffpost.com/entry/prenups_n_4145551)

## Prenuptial Agreement: Meaning :

A prenuptial agreement, often referred to as a "premarital agreement" or "antenuptial agreement," is a formal contract entered into by a couple prior to their marriage. This legal document outlines the division of property and assets between the partners in the event of a divorce or the death of one spouse.<sup>4</sup> A prenuptial agreement is a formal contract between two individuals intending to marry, outlining the terms and conditions related to asset ownership, management of future earnings, control over individual property, and the probable disunion of assets in the occurrence of a divorce. This type of agreement is particularly beneficial when one party possesses substantial assets, has children from a previous marriage, earns a significant income, or has experienced financial challenges in past relationships.<sup>5</sup>

## Comparative Study on prenuptial agreement with other countries:

### ❖ England

Prenuptial agreements were traditionally not enforceable under English law. In *Westmeath v. Westmeath*<sup>6</sup>, the Court ruled that any contract or agreement that financially incentivizes one party to dissolve the marriage is against public policy and detrimental to the sanctity of the marital institution. However, in a landmark decision, the UK Supreme Court recognized the enforceability of prenuptial agreements under British law in the case of *Radmacher v. Granatino*<sup>7</sup>. The Court outlined three key conditions for such agreements to be valid: first, the agreement must be entered into voluntarily and without coercion; second, both parties are required to fully disclose their financial circumstances; and third, the terms of the agreement must not be unfair or inequitable.

**Jeremy D' Morley**, a distinguished expert in international family law, observed in his analysis of early English case law that the reluctance of English courts to uphold prenuptial agreements reflects an outdated and rigid aspect of English legal principles. He described this as a persistent unwillingness to modernize the law in line with evolving societal norms.<sup>8</sup> D' Morley's findings highlighted that English society had undergone significant transformations, rendering the Hyman principle increasingly irrelevant in contemporary legal contexts. He further asserted that the antiquated judicial stance deeming binding prenuptial agreements as incompatible with public policy remains entrenched. According to D' Morley, the time has come to abandon these old precedents, as modern public policy now supports the acceptance of prenuptial agreements within English law.

The validity of Morley's assertion was affirmed in 2006 when the Law Society of England noted an emerging trend in which English courts increasingly upheld agreements voluntarily made by parties, particularly in the context of prenuptial agreements.<sup>9</sup> However, this progressive approach appeared to take a step back in 2008. In the case of *MacLeod v. MacLeod*<sup>10</sup>, the Privy Council ruled that objections rooted in public policy did not affect the enforceability of postnuptial agreements, thereby affirming their validity. Nonetheless, the Council simultaneously maintained that prenuptial agreements would continue to face such objections under public policy.

Despite this significant ruling, prenuptial agreements have not gained widespread acceptance in English society. Nonetheless, in disputes over such agreements, the courts are expected to carefully examine the parties' intentions and thoroughly assess the circumstances to determine the agreement's validity. Following an extensive review of family laws, the Law Commission proposed a framework<sup>11</sup> in its February 2014 report titled *Matrimonial Property, Needs, and Agreements*. This framework aimed to establish the legal validity of prenuptial agreements. It introduced the concept of "Qualifying Nuptial Agreements," recommending guidelines to ensure that such agreements could be legally enforceable. This approach would allow couples to create binding contracts regarding the division of finances and assets in the event of a marriage breakdown.

Consequently, it is evident that English law is progressing toward formally recognizing prenuptial agreements in divorce proceedings, marking a shift from traditional to contemporary perspectives.

### ❖ France

France identifies prenuptial agreements as part of its vow to the *Hague Convention on the Law Applicable to Matrimonial Property*<sup>12</sup>. However, the French Civil Code, specifically Article 1387, sets forth its own rules regarding these agreements. The provisions highlight that couples face limited restrictions when entering into prenuptial agreements. One key requirement is that both parties must appear before a public authority before marriage to determine the applicable legal framework for their union.

The French Civil Code also governs property distribution in the event of separation, with some flexibility for modifications within a specified period, but excluding changes to the default legal regime. If a couple opts not to establish a prenuptial agreement, the default system is the "communauté légale," a community property regime that governs their legal relationship. Notably, there is no responsibility to unveil assets or debts erstwhile to entering into a prenuptial agreement.<sup>13</sup>

In French law, spouses have the option to sign a marriage contract either before or during their marriage. These contracts outline how the couple's assets, both those acquired before and during the marriage, will be treated. This is why the term "matrimonial regime" is used in French law, with "regime" translating to "rule" in French. A matrimonial regime refers to the rules governing how property is managed, enjoyed, and disposed of by spouses during

<sup>4</sup> FRUMKES, M. B., Why a prenuptial agreement. Vol .33. ABA, No. 3 (Winter 2011), p. 7

<sup>5</sup> Prenuptial agreement, The Britannica Dictionary.

<sup>6</sup> *Westmeath v. Westmeath*, 6 E. R 619, (1830)

<sup>7</sup> *Radmacher v. Granatino*, U.K.S. C 42, (2010)

<sup>8</sup> Jeremy D. Morley, Enforceable Pre-nuptial Agreements: Their Time has Come, 36 family law Journal 772 (2006).

<sup>9</sup> see law society of England and Wales, family Law Protocol (2nd ed., 2006).

<sup>10</sup> *MacLeod v. MacLeod*, (2008) UKPC 64.

<sup>11</sup> Law Commission (United Kingdom), Matrimonial Property Agreements, Consultation Paper No. 343, (2014)

<sup>12</sup> The Hague Convention on the Law Applicable to Matrimonial Property Regimes' 1978, Art 12

<sup>13</sup> Morley Jeremy D. Prenuptial agreements in France. The Law Office Of Jeremy D. Morely,

the marriage. The choice of a matrimonial regime is made within the marriage contract itself. The primary purpose of the marriage contract is to select the matrimonial regime the couple wishes to adopt. Title IV bis of the French Civil Code is dedicated to marriage contracts and matrimonial regimes, meaning the two terms are closely intertwined in French legal terminology.

The French Civil Code recognizes three main types of matrimonial regimes: the community regime, the regime of separation of acquisitions, and the separation of assets. However, couples are free to agree on other terms. For instance, they might opt for a community regime but agree that the community will be divided unequally. Typically, marriage contracts are drafted and signed in the presence of a notary, a legal professional specializing in patrimonial matters who serves as a neutral public officer. Only one notary is needed to prepare the contract, as opposed to each spouse requiring separate representation.

There have been cases where foreign clients, unable to speak French, signed marriage contracts without understanding their content because it was not translated or explained to them. By the time a divorce occurs, it is usually too late to challenge the contract or hold the notary liable. It's important to note that marriage contracts in French law primarily address the division of assets and do not typically include provisions regarding maintenance payments in the event of divorce or separation.

Since June 18, 2011, the Maintenance Regulation of December 18, 2008, which covers jurisdiction, applicable law, recognition, enforcement of orders, and cooperation in maintenance matters, has been enforced in France and throughout Europe. This regulation allows spouses to choose the jurisdiction that will handle maintenance obligations, either in a prenuptial agreement or during the marriage. In terms of applicable law, the regulation refers to the Hague Protocol of November 23, 2007, which also gives spouses the ability to elect the matrimonial law that will govern their marriage.

In international cases, it's usually not advisable to sign multiple prenuptial agreements, as French courts will typically only recognize the most recent agreement, even if it contradicts a French prenuptial agreement. However, the Hague Convention allows couples to sign a contract designating the law of a country where they have a connection, which will govern the assets they hold and may acquire. This is the only scenario where the Convention permits the signing of multiple contracts or the designation of more than one applicable law.

#### ❖ China

Historically, women in China have typically held less property than their male counterparts. This disparity has led many Chinese women to seek greater equity in prenuptial agreements. Recognizing the evolving societal needs, the Chinese government, in 2001, acknowledged the legal enforceability of prenuptial agreements. Under Article 19 of the Marriage Law of the People's Republic of China<sup>14</sup>, certain conditions were established for these agreements to be valid. The law mandates that such agreements must be documented in writing and must clearly outline the mutual consent of the spouses. Prenuptial agreements are legally enforceable in China and must be in writing<sup>15</sup>. Article 19 of the 2001 Marriage Law of the People's Republic of China provides that "A husband and wife may agree that property acquired during the marriage, as well as property acquired before the marriage, can be held separately, jointly, or partially separate and partially joint." Despite this legal provision, China's divorce rate has been on the rise. In the first half of 2017 alone, approximately 1.9 million couples divorced, marking an increase of more than 10 percent compared to the same period the previous year<sup>16</sup>. However, fewer than 5 percent of couples in China were choosing to enter into prenuptial agreements each year.<sup>17</sup>

The agreement should specify whether properties will be acquired individually or collectively during the marriage and address the ownership of assets acquired before the marriage—whether retained individually or shared, based on the spouses' consensus.

This legal evolution gained further validation when the Hong Kong High Court, in *SHP v. SAI (2013)*<sup>18</sup>, referred to the principles established in the *Radmacher case*<sup>19</sup> and ruled that prenuptial agreements should be recognized as binding in Hong Kong as well. This landmark decision underscored the legitimacy of prenuptial agreements, emphasizing their legal weight. The broader objective behind these developments was to empower Chinese women by ensuring their right to own and manage property independently. China operates under a community property regime, meaning that without a prenuptial agreement, marital assets are typically divided equally upon divorce<sup>20</sup>. Despite this, prenuptial agreements remain uncommon, particularly among lower-middle-income couples, likely due to cultural perceptions of bad luck and feelings of mistrust surrounding such agreements. Furthermore, there is a lack of explicit guidelines on how Article 19 should be practically implemented, including what essential terms should be included and how asset division should be outlined. This ambiguity may contribute to the limited popularity of prenuptial agreements in China. However, a key interpretation by the Supreme People's Court of China offers some guidance, specifying that a house bought before marriage remains the personal property of the owner after divorce. However, if mortgage payments were made during the marriage by the non-owner spouse, the owner must reimburse those contributions.<sup>21</sup>

In China, women often play a significant role in childbearing, educating children, and managing household responsibilities.<sup>22</sup> The failure to recognize these invisible contributions, which indirectly contribute to the family's wealth, is problematic. This issue is further compounded by the judicial approach,

<sup>14</sup> Marriage Law of the People's Republic of China, (2001), Art. 19 (China)

<sup>15</sup> Marriage Law of the People's Republic of China, 2001, Art. 19 (China)

<sup>16</sup> Coco Liu, What's stopping the Chinese from saying 'I do' to a Prenup? October 21, 2017, available at <http://www.scmp.com/week-asia/society/article/2116319/whats-stopping-chinese-saying-i-do-prenup> (Last visited on June 18, 2019).

<sup>17</sup> Cheng Yingqi, Survey: Chinese reluctant about prenups, CHINA DAILY, May 12, 2011, available at [http://www.chinadaily.com.cn/china/2011-05/12/content\\_12493357.htm](http://www.chinadaily.com.cn/china/2011-05/12/content_12493357.htm) (Last visited on June 23, 2019).

<sup>18</sup> *SPH v. SA*, (2014) F.A.C.V 22/2013

<sup>19</sup> *Radmacher v. Granatino*, U.K.S. C 42, (2010)

<sup>20</sup> The Common Property under China Marriage Law, HG LEGAL RESOURCES, available at <https://www.hg.org/legal-articles/the-common-property-under-china-marriage-law-18614>

<sup>21</sup> Supreme People's Court, Interpretation (III) of the Supreme People's Court of Several Issues on the Application of the Marriage Law of the People's Republic of China, August 2011; Qiao Hong, New Interpretation of Chinese Marriage Law sparks loud debate, 17(6) CONFUCIUS INSTITUTE MAGAZINE (2011), available at <http://confuciusmag.com/new-chinese-marriage-law-sparks-loud-debate> (Last visited on Jan 11, 2025).

<sup>22</sup> Frank Zhao, Chinese Women Still Outworking Men at Home, WOMEN OF CHINA, available at <http://www.womenofchina.cn/womenofchina/html1/survey/1411/2106-1.htm> (Last visited on Dec 14, 2024).

which tends to allocate property based on whose name appears on the deed<sup>23</sup>, leaving women at a disadvantage, as they have historically held fewer assets than men. This inequity underscores the importance of balanced prenuptial agreements, particularly for Chinese women.

The divorce rate in China has been on the rise, with approximately 1.9 million couples ending their marriages in the first half of 2017. This figure represents an increase of over ten percent compared to the same period in the previous year.<sup>24</sup> Interestingly, less than five percent of couples in China were reported to opt for prenuptial agreements annually. Given that China follows a community property system, where assets are typically divided equally in the absence of a prenuptial agreement, one might expect higher adoption of such agreements.<sup>25</sup> However, their usage remains limited, possibly due to cultural beliefs associating prenuptial agreements with bad luck, alongside fears or distrust, particularly among lower-middle-income groups.

India's stance on prenuptial agreements is quite similar to that of Hong Kong. Without any specific legal framework for such agreements, it is difficult for Indian couples who have entered into prenuptial contracts to predict how the courts will rule in the event of a divorce. Although China has legalized prenuptial agreements, they are primarily popular among the younger generation and in large cities, while the older generation and those in rural areas tend to rely on traditional values. Whether a similar pattern will emerge in India remains to be seen and would require empirical research for confirmation.<sup>26</sup>

#### ❖ United States of America

In contrast to the legal treatment of prenuptial agreements in England and China, the status of such agreements in the United States is notably more stable. Across all fifty states, prenuptial agreements are recognized and enforceable, although each state has its own procedural requirements. The enactment of the "*Uniform Premarital Agreement Act*" in 1983 provided a significant framework, with 27 states adopting the legislation. The remaining states have established their own specific rules for prenuptial agreements.

If an agreement is deemed to be inequitable or in violation of public policy, it can be rendered void. The primary intent of these legal provisions is to protect the more vulnerable party and ensure fair division of assets between the spouses.<sup>27</sup>

Prenuptial agreements often serve to protect the interests of the spouse with significantly greater financial resources or the one whose wealth is likely to grow substantially during the marriage. Typically, these individuals possess greater financial acumen and legal awareness, as well as easier access to legal experts who can draft agreements skewed in their favor.

Furthermore, disparities in education, entrepreneurial skills, challenges related to relocation, and issues such as pregnancy may exacerbate the imbalance of power between the partners.<sup>28</sup> This inequity was evident in the California Supreme Court's decision in the *In Re Marriage of Bonds case*.<sup>29</sup> The court upheld a premarital agreement despite the wife's lack of legal representation, her limited proficiency in English (the language of the agreement), and the husband's substantial wealth, reasoning that the couple had mutually decided to maintain separate ownership of their assets during the marriage.

#### ❖ Austria

Austria is a countersigner to the *Hague Convention on the Law Applicable to Matrimonial Property Regimes*<sup>30</sup>, which legally administers prenuptial agreements. This framework allows couples to outline the division of their pre-marital assets, provided they meet the conditions specified in the Convention. As a result, Austria offers couples the freedom to determine the management and distribution of their assets according to their individual preferences.

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### Status of Prenuptial Agreements in India :

While prenuptial agreements are widely accepted in Western societies, they have yet to gain similar acceptance in Indian culture. In India, marriages are considered sacred and are perceived through a religious and emotional lens rather than as contractual arrangements. Consequently, prenuptial agreements lack recognition under Indian marriage laws, which do not regard marriage as a contractual obligation. Instead, marriage is viewed as a spiritual union between spouses, making prenups socially less acceptable.<sup>31</sup>

In India, prenuptial agreements have not traditionally been a well-known concept. However, in recent years, there has been a notable rise in the number of individuals, particularly from affluent socioeconomic backgrounds, opting for such agreements. These individuals see prenuptial contracts as a way to safeguard their assets against unforeseen circumstances.

While prenuptial agreements hold legal validity in Goa under the Portuguese Civil Code, they can also be recognized elsewhere in India if the marriage is conducted under the Special Marriage Act. In such cases, proper registration and submission of necessary documents at the Registrar's Office are required for the agreement to be legally enforceable.

<sup>23</sup> Tania Branigan, For richer, for poorer: how China's laws put women second, THE GUARDIAN, February 24, 2015, available at <https://www.theguardian.com/world/2015/feb/24/chinese-women-equality-laws-land-housing> (Last visited on June 19, 2019).

<sup>24</sup> Coco Liu, What's stopping the Chinese from saying 'I do' to a Prenup?, October 21, 2017, available at <http://www.scmp.com/week-asia/society/article/2116319/whats-stopping-chinese-saying-i-do> prenup

<sup>25</sup> The Common Property under China Marriage Law, HG legal Resources, available at <https://www.hg.org/legal-articles/the-common-property-under-china-marriage-law-18614>

<sup>26</sup> Zhang Xian Chu, Prenuptial Agreements in China, INTERNATIONAL ACADEMY OF FAMILY LAWYERS, available at [https://www.iafl.com/library/iafl\\_law\\_journal/back\\_issues/volume\\_1/prenuptial\\_agreements\\_in\\_china/index.html](https://www.iafl.com/library/iafl_law_journal/back_issues/volume_1/prenuptial_agreements_in_china/index.html) (Last visited on June 19, 2019)

<sup>27</sup> Amrita Ghosh & Pratyusha Kar, Pre-nuptial Agreement in India: An analysis of law and society 2019, NUJS Law Review.

<sup>28</sup> In re Estate of Hollett, 94 834 A.2d 349 (N.H. 2003); Mallen v. Mallen, 622 S.E.2d 812, 814 (Ga. 2005).

<sup>29</sup> In re Marriage of Bonds, 5 P.3d 816, 817, 819, 837, 838 (Cal. 2000)

<sup>30</sup> Supra note 8,

<sup>31</sup> Are prenuptial agreements valid and enforceable in India? The Economic Times, <https://economictimes.indiatimes.com/analysis/are-prenuptial-agreements-valid-and-enforceable-inindia/articleshow/44782040.cms>

Furthermore, **Section 40 of the Divorce Act of 1869** includes a specific provision for prenuptial agreements, empowering the court to examine premarital and postmarital arrangements before delivering its final judgment.<sup>32</sup>

Pollock defines a contract as “an agreement and promise enforceable by law.” For an agreement to qualify as a valid contract, it must adhere to the criteria outlined in **Section 10 of the Indian Contract Act**<sup>33</sup>. This provision states that “agreements are contracts if they are made by free consent.” In essence, the parties involved must willingly and knowingly enter into the agreement without any coercion, fraud, or undue influence. Additionally, the contract must be executed in the presence of witnesses, properly signed by all parties, and formalized through registration and notarization to establish its legal validity.

Former **Minister for Women and Child Development**, Maneka Gandhi, recently urged the **Minister for Law and Justice**, D.V. Sadananda Gowda, to consider making pre-marital agreements mandatory for couples intending to marry.<sup>34</sup> A prenuptial agreement serves as a memorandum of understanding (MoU) between the parties. For such an MoU to hold legal validity in court, both individuals must mutually agree to its terms, sign it in the presence of witnesses, and ensure it is duly registered or notarized with the relevant authority.

An example highlighting the potential benefits of such agreements can be drawn from the high-profile divorce of **Hrithik Roshan and Sussanne Khan**<sup>35</sup>, where the husband reportedly paid his ex-wife an alimony of ₹380 crores. Had there been a pre-marriage agreement outlining the division of assets, finances, child custody, and other rights and obligations in case of a divorce, he could have potentially avoided paying such a substantial amount.

Introducing prenuptial agreements as a legally enforceable framework in India also aligns with the principles of an egalitarian society, ensuring equal opportunities for both parties to protect the assets and financial resources acquired before marriage. This approach underscores the need for lawmakers to enact specific provisions or legislation that support the validity and enforceability of prenuptial agreements, promoting fairness and eliminating gender biases.

In India, unlike the United States, the administration of prenuptial agreements is not governed by specific legislation. Instead, as previously mentioned, these agreements are primarily assessed through the lens of their contractual nature and are subject to the provisions of **Section 10 of the Indian Contract Act, 1872**. If such agreements are deemed contrary to public policy, they may be rendered void under **Section 23** of the same Act. The determination of what constitutes public policy involves evaluating factors that promote the public interest while safeguarding the broader societal framework.

As the interpretation of public policy in India evolves, there is a growing hope that well-drafted prenuptial agreements will no longer be seen as conflicting with public policy. This shift aligns with the current context, where an increasing number of individuals are expressing a preference for such agreements to protect their interests. Adopting a progressive understanding of public policy, akin to the approach in the United States, could significantly enhance the enforceability and effectiveness of prenuptial agreements in India.

The trajectory of English law has significantly evolved from its traditional conservative stance and now appears to be on the brink of granting prenuptial agreements binding status in divorce proceedings. In India, while the progression is more gradual, there is a noticeable shift in judicial attitudes. Departing from earlier precedents, courts in cases such as **Sandhya Chatterjee v. Salil Chatterjee**<sup>36</sup>, **CIT v. Mansukh Rai More**<sup>37</sup>, and **Sunita Devendra v. Sitadevi Desh prabhu**<sup>38</sup> have upheld the validity of marital agreements. Furthermore, the Indian Ministry of Women and Child Development has recently proposed measures to formalize the legal recognition of prenuptial agreements.

This initiative aims to safeguard the rights of divorced women concerning property division, maintenance, and child custody—marking a progressive step toward strengthening women’s rights within the framework of marital relationships.

The legal standing of prenuptial agreements in India bears a striking resemblance to their status in Hong Kong. Since there is no specific legislation governing prenuptial agreements in India, it becomes challenging for couples who have entered into such agreements to predict how courts might rule in the event of a divorce. Interestingly, while prenuptial agreements have been legalized in China, their acceptance is largely confined to the younger population and urban areas. In contrast, the older generations and those in rural regions continue to adhere to traditional norms.<sup>39</sup> Whether a similar pattern would emerge in India remains a question that can only be answered through empirical studies.

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## Evolution of prenuptial Agreements :

Prenuptial agreements have emerged as an essential tool in today's world, where, figuratively speaking, divorces often occur more swiftly than marriages.<sup>40</sup> Although prenuptial agreements are often seen as a modern development, the concept is not new and has historically been recognized in various cultures and religions, albeit in different forms. In Anglo-Saxon society, for example, marriage had a distinctly contractual nature. The groom effectively purchased the right to marry the bride by paying a price based on her social status.<sup>41</sup>

<sup>32</sup> Lisa, Analysis of Prenuptial Agreement in India, Legal Service India E-journal

<sup>33</sup> The Indian Contract Act, 1872, No.09, Act of Parliament, 1872 (India).

<sup>34</sup> Prenuptial agreements: building a safety net around assets, Mint.

<sup>35</sup> Sunitra Pacheco, Hrithik Roshan’s estranged wife Sussanne demands Rs 400 crores in alimony, IE

<sup>36</sup> *Sandhya Chatterjee v. Salil Chandra Chatterjee*, 1980 SCC Online Cal 67: AIR 1980 Cal 244.

<sup>37</sup> *CIT v. Mansukh Rai More*, 1988 SCC Online Cal 339: (1988) 174 ITR 703: (1989) 75 CTR 101.

<sup>38</sup> *Sunita Devendra Deshprabhu v. Sitadevi Deshprabhu*, 2016 SCC Online Bom 9296: (2016) 6 Bom CR 567.

<sup>39</sup> Zhang Xian Chu, Prenuptial Agreements in China, International academy of family lawyers, available at [https://www.iafl.com/library/iaml\\_law\\_journal/back\\_issues/volume\\_1/prenuptial\\_agreements\\_in\\_China/index.html](https://www.iafl.com/library/iaml_law_journal/back_issues/volume_1/prenuptial_agreements_in_China/index.html).

<sup>40</sup> Akansha Ghose & Pallavi Agarwal, Prenuptial Agreement: A Necessity of Modern Era, 2 International Journal of Research And Analysis, 4-6 (2014).

<sup>41</sup> Lloyd Bonfield, Property Settlements on Marriage in England from the Anglo-Saxons to the Mid-Eighteenth Century, in *Marriage, Property, and Succession* 287, 292-93 (Lloyd Bonfield ed., 1992)

Prenuptial agreements are not a recent innovation; historical evidence reveals that such agreements have existed for millennia between prospective spouses. Following the death of Prophet Muhammad, his great-granddaughter, Sukayna, entered multiple marriages, each time imposing written conditions that prevented her husbands from taking certain actions against her.

Over 2,000 years ago, one of the earliest recorded forms of a prenuptial agreement existed within the *Hebrew marriage contract* known as the “*Ketubah*.” Its primary purpose was to ensure a woman’s security in cases of widowhood or divorce, requiring the husband to uphold certain financial responsibilities toward her.

A similar concept can be found in the Jewish practice of *Ketubah marriage*, which bears a resemblance to modern prenuptial agreements. The *Ketubah* outlines the rights and obligations between husband and wife, including provisions for the wife's maintenance in the event of divorce or the husband's death. In much the same way, the practice of dower in Islamic marriages exhibits characteristics of a prenuptial agreement, ensuring the wife’s financial security in the case of marriage dissolution.

In 19th-century Europe, it became customary for husbands to guarantee a portion of their property—usually one-third—to their wives as a form of dowry upon their death. Similarly, in colonial America under common law, a widow had the right to inherit her deceased husband’s real estate as part of her dowry.

Some historical accounts suggest that between 1461 and 1464, *King Edward IV and his wife Eleanor Butler* may have entered into a prenuptial agreement, making it one of the earliest examples of such an arrangement in England during the 15th century.

For much of U.S. history, married women were legally barred from owning property. This situation began to shift with the enactment of the *Married Women’s Property Act of 1848* in New York, which marked a significant legal change for women’s rights.<sup>42</sup>

In Islamic law, the concept of premarital agreements, often referred to as “*mahr*,” predates the widespread Western understanding of prenuptial contracts. In the context of Muslim marriages, it is customary to negotiate a *mahr*, which is a monetary gift from the husband to the wife as part of the marriage contract. This practice reflects the long-standing tradition of premarital agreements within Islamic law.<sup>43</sup> Across the world, different societies, cultures, and legal systems have adopted various forms of such agreements, demonstrating their historical and widespread nature.

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## Marriage Laws in India:

### *Prenuptial Agreement in Hindu Law*

The Vedas describe marriage as “*a union of flesh and bone*,” highlighting its profound spiritual and physical significance. **The Hindu Marriage Act of 1955** regards marriage as a sacred and divine alliance between a man and a woman, transcending the notion of a mere contractual relationship.<sup>44</sup> In Hindu tradition, marriage is considered eternal, symbolizing an unbreakable bond that continues even beyond the death of the spouses. It is widely believed that the sacred bond unites the couple as husband and wife for seven subsequent lifetimes. This belief stems from the ritual of taking seven steps around the holy fire, a practice mandated by Section 7 of the Act to solemnize the marriage. In contrast, prenuptial agreements are perceived as a foreign concept within Indian culture, often associated with Western traditions.<sup>45</sup> Indian society tends to view such agreements as incompatible with its deeply ingrained marital values, leading to debates over their acceptance, validity, and constitutional standing.

#### A. Valid Prenuptial Agreements

While Indian case law predominantly challenges the validity of prenuptial agreements within the framework of Hindu marriages, some judicial decisions have recognized their enforceability under specific circumstances.

In the case of *Pran Mohan Das v. Hari Mohan Das*<sup>46</sup>, a man entered into a marriage on the assurance from his prospective father-in-law to gift a house to his daughter. Following the marriage, the father-in-law transferred possession of the property through an unregistered gift deed. The couple occupied the house for several years before selling it to third parties. Subsequently, the wife’s father filed a lawsuit seeking to reclaim the property.

The Calcutta High Court ruled in favor of the prenuptial agreement, deeming it valid. The doctrine of “part-performance of a contract” was invoked to prevent the plaintiff from reclaiming the property. Furthermore, the court determined that the agreement did not constitute a marriage brokerage contract and, therefore, was not in contravention of public policy.

While Indian jurisprudence largely challenges the validity of premarital agreements within the context of Hindu marriages, there are notable cases that have sought to establish their enforceability.

In the case of *Commissioner of Income Tax v. Mansukhrai More*<sup>47</sup>, the Calcutta High Court held that transferring property in compliance with a prenuptial agreement to fulfill obligations made therein was permissible. The court determined that such a transfer did not contravene the provisions of **Section 16(3) of the Indian Income Tax Act, 1922**.

In another instance, the Bombay High Court, in the case of *Appibai v. Khimji Cooverji*<sup>48</sup>, adopted a nuanced approach toward prenuptial agreements. The Court ruled that the principles established in the *Mon Mohini* and *Krishna Aiyar* cases would not apply in situations where the husband had abandoned his wife. Furthermore, such circumstances would not raise concerns about contravening public policy. The judgment emphasized that, although Hindu

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<sup>42</sup> Poliacoff, Jerome h. What Does Love Have to Do with, 33, ABA,3, 2011, 12–15

<sup>43</sup> Matisa Majumder, Prenuptial Agreement: Enforcing Marriage in the eyes of Law, 3 International Journal of Law and Legal Jurisprudence Studies, 468 (2016).

<sup>44</sup> Bijaya Das, is a Pre-nuptial Agreement Valid in India? Available at [News18/specials](https://www.news18.com/news/specials/bijaya-das-is-a-pre-nuptial-agreement-valid-in-india-2019-11-15).

<sup>45</sup> Kumar V., Quest for Prenuptial Agreement in Institution of Marriage, 60(4), JILL, 406- 426, 2018.

<sup>46</sup> Pran Mohan Das v. Hari Mohan Das, 1924 SCC Online Cal 94: AIR 1925 Cal 856

<sup>47</sup> Commissioner of Income Tax v. Mansukhrai More, (1988) 174 ITR 703 Cal.

<sup>48</sup> Appibai v. Khimji Cooverji, 1934 SCC Online Bom 62: AIR 1936 Bom 138.

law places the husband in a position of reverence akin to that of a 'deity' or 'god' for the wife, this reverence does not permit the husband to neglect or repudiate his marital responsibilities. The Court concluded that, under the terms of the prenuptial agreement, the wife was entitled to separate maintenance and residence, provided there was no question regarding her chastity. However, the Court refrained from ruling in favour of the wife's claim for ornaments outlined in a separate prenuptial agreement, citing ambiguity in the terms of that agreement.

An analysis of case laws pertaining to Hindus reveals a gradual yet noticeable shift in the approach of Indian courts over time. Interestingly, courts have generally refrained from directly recognizing prenuptial agreements as inherently valid. Instead, they have employed two distinct strategies to interpret and uphold such agreements. The first approach involves enforcing the provisions of prenuptial agreements in conjunction with other legal doctrines, such as property laws. The second method entails carving out exceptions within the existing judicial framework, which traditionally views prenuptial agreements as invalid due to their perceived inconsistency with public policy.

### B. Invalid Prenuptial Agreements

In the case of *Paigi v. Sheonarain* ('Sheonarain')<sup>49</sup>, the plaintiff, a husband, entered into a prenuptial agreement before his marriage, agreeing to reside with his wife in her mother's home. Despite this agreement, he later abandoned the house, refused to return, and began living with a Muslim woman whom he had taken as his mistress. Following this, he initiated legal proceedings to claim restitution of conjugal rights. Upon appeal by the defendant wife, the Allahabad High Court ruled in favour of the plaintiff, allowing him to reclaim his conjugal rights, subject to his "restoration to caste." The court further directed the defendant wife to return to her husband within one month of such restoration. Notably, the wife's argument that her husband's violation of their prenuptial agreement—upon which she had consented to the marriage—disqualified him from enforcing his conjugal rights, was dismissed by the court as "absurd."

In the case of *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh*<sup>50</sup>, a pre-nuptial agreement was executed by the son, his father, and his mother while the son was still a minor. The agreement stipulated that the son would reside in his mother-in-law's house and comply with her instructions. For approximately 15 years, the arrangement was followed. However, disputes arose, prompting the husband to leave his mother-in-law's residence and request his wife to move in with him. The Calcutta High Court held that the agreement, by seeking to impose a permanent restriction on the husband's rights under Hindu law, had the potential to undermine the marital relationship. Consequently, the Court declared the pre-nuptial agreement invalid.

In the case of *Krishna Aiyar v. Balammal*<sup>51</sup> ('Krishna Aiyar'), a petition was filed by a husband seeking restitution of conjugal rights. After initiating the suit, the couple reached a settlement to live together, with the husband agreeing to pay alimony in case of a future separation. However, the wife did not return to marital life after this agreement, meaning the arrangement was not prenuptial. Despite this, the Madras High Court, referencing the *Mon Mohini* case, ruled the agreement invalid, citing its contradiction with the marital duties under Hindu law. The court further stated that the agreement violated public policy by contemplating future separation.

In *A.E. Thirumal Naidu v. Rajammal*<sup>52</sup>, the Madras High Court was tasked with addressing whether a prenuptial agreement between spouses to live apart conflicted with a wife's claim for restitution of conjugal rights. Relying on the *Krishna Aiyar* ruling, the court affirmed that Hindu marriage is not merely a contractual arrangement but a sacred bond, and a prenuptial agreement concerning future separation is against public policy and, thus, unenforceable.

An analysis of the relevant cases reveals that the use of the public policy argument in invalidating such agreements has generally manifested in two primary ways. First, prenuptial agreements containing provisions that attempt to override the rights and entitlements established by Hindu personal law and customs have been annulled on the grounds of public policy. Second, agreements that include clauses perceived by the court to potentially promote the dissolution of the marriage in the future have also been deemed contrary to public policy.

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## Prenuptial Agreement in Muslim Law :

The prenuptial agreement, commonly referred to as the Urdu *Nikah-Nama*, serves as a fundamental aspect of Muslim marriage. It is signed by the couple during the wedding ceremony and outlines the rights, obligations, and responsibilities of the parties involved, including the witnesses present at the event. This document must be publicly declared and cannot remain confidential.<sup>53</sup>

Justice Mahmood, in the case of *Abdul Kadir v. Saliman and Others*<sup>54</sup>, observed that "Marriage among Muslims is not a sacrament but essentially a civil contract." Similarly, Justice V.R. Krishna Iyer, in the case of *Yusuf v. Sowaramma*<sup>55</sup>, emphasized that Muslim marriage is a civil contract and does not bear religious sanctity.

Muslim matrimonial law underscores that marriage among Muslims is not a sacrament. Instead, it is perceived as a civil agreement between two individuals, characterized by a formal proposal from one party and its acceptance by the other.

### A. Valid prenuptial agreements

In the case of *Muhammad Muin-Ud-Din v. Musammat Jamal Fatima*<sup>56</sup>, the Allahabad High Court upheld the validity of a prenuptial agreement stipulating that, in the event of marital conflict, the husband was obligated to provide maintenance beyond the payment of dower debts.

<sup>49</sup> *Paigi v. Sheonarain*, 1885 SCC Online All 24: ILR (1886) 8 All 78.

<sup>50</sup> *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh*, (1901) ILR 28 Cal 751

<sup>51</sup> *Krishna Aiyar v. Balammal*, ILR (1911) 34 Mad 398.

<sup>52</sup> *A.E. Thirumal Naidu v. Rajammal*, 1967 SCC Online Mad 3: (1967) 2 Mad LJ 484

<sup>53</sup> Kumar V., Quest for Prenuptial Agreement in Institution of Marriage, 60(4), JILI, 406- 426, 2018.

<sup>54</sup> (1886) I.L.R 8 All 149

<sup>55</sup> 1971 S.C.

<sup>56</sup> *Muhammad Muin-Ud-Din v. Musammat Jamal Fatima*, 63 Ind Cas 883

In the case of *Buffatan Bibi v. Sk. Abdul Salim*<sup>57</sup>, the husband initiated a lawsuit seeking the restitution of conjugal rights against his wife. In her defense, the wife asserted that the husband had not honored the stipulations outlined in the “*kabinnama*”—a prenuptial agreement duly executed by him. As a result, she claimed to have exercised her right to divorce herself and no longer considered herself his wife. The Calcutta High Court, upon examining the matter, noted that under Mohammedan law, it is permissible for an individual to delegate the power of dissolving the marriage to their spouse. The court further ruled that the terms of the “*kabinnama*”, which authorized the wife to reside at her father’s home in case of discord and allowed her to dissolve the marriage if the husband failed to provide maintenance for six consecutive months, constituted a legally valid agreement.

The case of *Mohd. Khan v. Mst. Shahmali*<sup>58</sup> presents a distinctive scenario involving prenuptial agreements, Islamic law, and public policy. The contention revolved around a prenuptial arrangement wherein the respondent, as the spouse, agreed to reside as a *khana damad* in the house of the petitioner’s father. Additionally, the respondent undertook to cover the wedding expenses if he chose to leave the household. The agreement stipulated that any breach of this condition would result in an automatic dissolution of the marriage. The husband, however, failed to fulfill his marital obligations and abandoned the family for four years. The High Court of Jammu and Kashmir, as the second appellate authority, examined the enforceability of this agreement under Islamic law. The Court observed that the practice of *khana damad* was prevalent in the Kashmir Valley, often involving mutual consent. It highlighted that the *khana damad* typically benefitted from various privileges, while the father-in-law incurred substantial wedding expenses. Consequently, requiring reimbursement from the son-in-law under the terms of the agreement was deemed consistent with existing laws and customs.

An analysis of these cases reveals a tendency of Indian courts to uphold prenuptial agreements made between Muslim couples. It is notable that the initial rejection of such agreements was partly influenced by the perspective on public policy prevalent in British courts at the time. During the late 19th century, a straightforward yet flawed belief seemed to dominate: that planning for a potential separation implied an intention to separate, which shaped judicial interpretations of public policy. However, subsequent cases demonstrate a shift towards a more progressive approach. Courts began considering factors such as the context in which the prenuptial agreement was formed and the extent to which it imposed limitations on the rights of the spouses when evaluating its compatibility with public policy.

### B. Invalid Prenuptial Agreements

In the case of *Bai Fatma v. Alimahomed Aiyeb*<sup>59</sup>, the Bombay High Court deliberated on the validity of an agreement between a Muslim husband and wife, which stipulated a specific maintenance amount in the event of their future separation. The court concluded that such an agreement, by its nature, promoted the possibility of future separation and was, therefore, invalid as it contravened public policy. While delivering its judgment, the court drew upon the English law of that era for guidance. Interestingly, in modern times, the Supreme Court of England, in the *Radmacher* case, upheld the validity of prenuptial agreements. The court emphasized the importance of respecting individual autonomy, noting that “the reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated.”<sup>60</sup>

In the case of *Khatun Bibi v. Rajjab*<sup>61</sup>, a husband initiated legal proceedings against his wife, seeking restitution of conjugal rights. The wife argued that she had divorced him due to his failure to fulfill a specific condition outlined in their prenuptial agreement. According to the agreement, the husband was obligated to reside in his wife's maternal home and could not relocate elsewhere without the consent of his mother-in-law. Furthermore, the agreement granted the mother-in-law authority to arrange another marriage for her daughter in case of disputes. The Allahabad High Court held that such restrictions on a spouse’s freedom were against public policy. The Court further observed that a prenuptial condition requiring the husband to permanently live with the mother-in-law violated the principles of Mohammedan law, rendering it invalid.

In the case of *Ahmad Kasim Molla v. Khatun Bibi*<sup>62</sup>, a prenuptial agreement stipulated that the husband-to-be pledged to provide financial support, including a monthly allowance and housing expenses, should he subject his wife to cruel treatment, allowing her to leave him. Following instances of mistreatment, the wife chose to separate from her husband. Subsequently, the husband issued a *talak Nama* (divorce deed), but it was never delivered to the wife. The Calcutta High Court held that while the delivery of the *talak Nama* was not a prerequisite for the separation to take effect, the wife’s awareness of the divorce was essential for her to claim maintenance, as the *iddat* period would commence from the time she was informed of the divorce. Since there was no evidence proving that the wife knew about the *talak Nama* prior to initiating legal proceedings, the court ruled that she was entitled to interim maintenance. The *kabinnama* (prenuptial agreement) did not specify a duration for basic sustenance payments nor explicitly mention divorce. Consequently, the court found that the husband had no obligation to provide maintenance beyond the *iddat* period following the marriage dissolution. The wife’s entitlement was thus limited to support during this period. However, Justice Costello criticized the judgment for flawed legal reasoning, emphasizing that his focus was strictly on the legal dimensions of the case, unperturbed by any ethical considerations.

An analysis of the cited cases reveals that public policy considerations regarding the enforceability of prenuptial agreements are not confined to those entered into by Hindu couples. Even in the context of prenuptial agreements involving Muslim couples, courts have invoked public policy concerns to nullify such agreements. Judicial scrutiny in this area has predominantly focused on invalidating agreements that seem to promote the separation of spouses. Additionally, clauses that limit the autonomy of either spouse or contravene the principles of Mohammedan law are often deemed unenforceable. Courts also tend to adopt a stringent approach when interpreting the provisions of the *nikah Nama*, which functions as a prenuptial agreement in such cases.

<sup>57</sup> *Buffatan Bibi v. Sk. Abdul Salim*, 1950 SCC Online Cal 28: AIR 1950 Cal 304.

<sup>58</sup> *Mohd. Khan v. Shahmali*, 1971 SCC Online J&K 32: AIR 1972 J&K 8.

<sup>59</sup> *Bai Fatma v. Alimahomed Aiyeb*, ILR (1913) 37 Bom 280: (1912) 14 Bom LR 1178

<sup>60</sup> *Radmacher v. Granatino*, (2010), UKSC 42

<sup>61</sup> *Khatun Bibi v. Rajjab*, AIR 1926 All 615

<sup>62</sup> *Ahmad Kasim Molla v. Khatun Bibi*, AIR 1933 Cal 27



## **Prenuptial Agreement in Christian Law and other communities in India :**

*The Indian Christian Marriage Act of 1872* regulates Christian marriages in India. It views marriage as a sacred union between a man and a woman. This legislation provides specific procedures for the solemnization and registration of marriages. Importantly, the legal aspects of marriage, such as registration and divorce, are treated separately from religious ceremonies. To attain formal legal recognition, marriages can also be registered under the *Special Marriage Act of 1954*. While religious customs emphasize the sanctity of marriage as a holy bond, they do not perceive it as a mere contractual arrangement.

To gain a comprehensive understanding of the legal status of prenuptial agreements within the framework of Indian law, it is essential to examine the case of *Mozelle Robin Solomon v. R.J. Solomon*,<sup>63</sup> alongside the Indian Divorce Act, 1869, and the Civil Code of Goa. In this case, the legal principles governing marriage and divorce among Jews were analysed, leading to the acknowledgment that "Jewish marriage is a contract and not a religious sacrament." Consequently, it is contended that, much like prenuptial agreements in Muslim marriages, which are recognized as civil contracts, prenuptial agreements in Jewish marriages in India could similarly be enforceable, provided they align with modern public policy standards.

Regarding Christian marriages, the legal position is relatively clear. It is well-established that Indian courts can take into account prenuptial agreements between Christian spouses when making decisions related to property settlements under the provisions of the Divorce Act. This highlights the broader acceptance of prenuptial agreements in Indian legal systems, albeit within the confines of applicable statutory and policy considerations.

Close attention should be paid to the legal framework in Goa, where a uniform civil code, rooted in the *Portuguese Civil Code of 1867*, is implemented. This framework ensures that personal laws hold no sway in the region. Prenuptial agreements concerning property distribution are recognized under the Portuguese Civil Code. In the absence of such agreements, the law presumes that the marriage operates under the principle of communion of assets. This arrangement grants equal rights to both spouses over the property acquired during the marriage, thereby protecting the wife's entitlement to an equitable share. The legal provisions under Goa's Civil Code have garnered widespread acclaim. The Supreme Court of India, in the case of *Damodar Ramnath Alve v. Gokuldas Ramnath Alve*<sup>64</sup>, acknowledged that the Portuguese Civil Code fortifies the family unit by safeguarding the rights of children and widows.

### **Public reception toward such Agreements :**

Prenuptial agreements are increasingly becoming a topic of interest. However, due to the lack of clear statutory provisions and the ambiguous stance of public policy, the enforceability of these agreements in court remains uncertain. Despite this legal ambiguity, prenuptial agreements are particularly favoured by affluent couples. In metropolitan cities such as Mumbai and Delhi, it is estimated that nearly 20% of marriages involve such agreements.<sup>65</sup> These contracts aim to address matters such as financial arrangements, individual responsibilities, and child custody in a pre-emptive manner.

Although many prospective couples are aware that prenuptial agreements currently lack binding legal authority, they perceive these documents as creating moral obligations. The growing popularity of prenuptial agreements has drawn the attention of policymakers, with the Ministry of Women and Child Development periodically exploring the possibility of formalizing them through legislation. Reports indicate, however, that central government authorities are cautious, considering it premature to grant these agreements legal recognition without further study of their implications. Consequently, the government's position on prenuptial agreements remains uncertain.

Given the current scenario, the growing popularity of prenuptial agreements appears to have drawn the attention of the Indian government. This is evidenced by periodic discussions initiated by the *Ministry of Women and Child Development* regarding the feasibility of granting such agreements legal recognition. However, reports suggest that consultations within Central Government ministries reflect a consensus that formalizing prenuptial agreements into enforceable legal instruments may be premature.<sup>66</sup> It is believed that further deliberation is necessary to assess the practicality of this move. Consequently, the government's stance on the legal recognition of prenuptial agreements remains unclear for the time being.

The perception of prenuptial agreements plays a crucial role in shaping societal and legal attitudes towards them. In the Indian context, the experiences of couples and the stance of Indian courts reflect a consistent resistance to the acceptance of prenuptial agreements. This section aims to explore the foundational reasons behind such opposition to granting these agreements legal recognition. By examining the principal objections often raised against prenuptial agreements, this analysis seeks to challenge these objections and present a counter-narrative that advocates for a broader acceptance of such arrangements.

### **Legality of Prenuptial Agreements :**

Pre-nuptial agreements remain an unfamiliar concept within the Indian legal and social landscape. India takes pride in its rich cultural heritage and the deep emotional bonds shared among its people. In contrast, European nations widely accept and recognize prenuptial agreements. While marriage in European countries is often treated as a contractual arrangement between spouses, in India, marriage is traditionally regarded as a sacred union, making the idea of prenups seem foreign to Indian society.

The Indian government, reflecting societal norms and values, has indicated that it is not considering immediate legal recognition for prenuptial agreements. It views this concept as an "urban phenomenon" and deems it premature to provide such agreements with formal legal status.

<sup>63</sup> *Mozelle Robin Solomon v. R.J. Solomon*, 1968 SCC Online Bom 120: (1979) 81 Bom LR 578.

<sup>64</sup> *Damodar Ramnath Alve v. Gokuldas Ramnath Alve*, 1996 SCC Online Bom 47: (1997) 4 Bom CR 653.

<sup>65</sup> Arunima Jha, Pre-Nuptial Agreement: A Death Knell for Marriage, A.P. legal services Pvt. Ltd., available at <http://www.goforthelaw.com/index.php/browsearticles/loadarticleview/181.html>

<sup>66</sup> Raghav Ohri, as marital bliss eludes couples, pre-nuptial agreements mark their Indian debut, the economics times, September 18, 2015.

In the case of *Bhagwati Saran Singh v. Parmeshwari Nandar Singh*<sup>67</sup>, the Allahabad High Court acknowledged prenuptial agreements as enforceable legal contracts within the Indian legal framework. The court emphasized that while marriage is regarded as a sacred institution, it also constitutes a civil contract between two parties.

Similarly, in *Pran Mohan Das v. Hari Mohan Das*<sup>68</sup>, a father had promised to gift a house to his daughter upon her marriage. Acting on this assurance, an individual agreed to marry the daughter, and the father transferred the property to her via an unregistered gift deed. Seven years later, the couple sold the property to a third party, prompting the father to file a suit seeking its recovery. The Calcutta High Court, however, upheld the validity of the prenuptial agreement in this matter.

### **Courts acknowledging the validities of the prenuptial agreements**

In the case of *Mohammed Khan v. Mst. Shamali*<sup>69</sup>, the parties entered into a prenuptial agreement stipulating that the husband would reside at the wife's father's house post-marriage. The agreement further provided that, in the event of non-compliance, the husband would bear the significant expenses associated with the wedding. Following their marriage, the husband abandoned the wife for a prolonged period of four years and failed to fulfil marital obligations. The High Court of Jammu and Kashmir upheld the enforceability of the agreement, ruling that it did not contravene Muslim law or public policy.

In *Sunita Devendra Deshprabhu v. Sitadevi Deshprabhu*<sup>70</sup>, a prenuptial agreement dated May 7, 1951, was voluntarily executed by the parties. This agreement outlined mutual terms for the separation of their properties. Although the court's decision relied on the terms of the agreement to resolve issues concerning property division, it did not address the validity of the prenuptial arrangement itself. Nevertheless, the agreement played a pivotal role in the resolution of the dispute.

In *Akileh v. Elchahal*<sup>71</sup>, the Appellate Court examined the validity of *Mahr*, an Islamic antenuptial agreement. The court highlighted that marriage itself constitutes sufficient consideration to validate such agreements. Accordingly, the court upheld the enforceability of the contract between the parties.

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### **Suggestion (why it should be wholly legalized in India?)**

There is a pressing need to introduce statutory provisions to address prenuptial agreements within the framework of the *Special Marriage Act* or the *Indian Contract Act*, as these agreements meet all the necessary conditions for a valid contract.

India, being a diverse and multicultural society, is witnessing the gradual acceptance of evolving concepts such as open relationships and live-in arrangements. Recognizing antenuptial agreements can serve to uphold the institution of marriage, reinforcing its importance within our societal framework.

The country is advancing towards implementing the *Uniform Civil Code (UCC)* under Article 44 of the *Indian Constitution*, a step aimed at fostering an organized and egalitarian society, as highlighted in the landmark *Shah Bano case*. With the introduction of the UCC, a comprehensive law governing prenuptial agreements could replace the existing personal laws, ensuring uniformity and fairness.

To safeguard the welfare of children, prenuptial agreements should incorporate specific clauses addressing custody arrangements and equitable distribution of property in the event of divorce. Such a move would enable the Indian legal system to formally recognize prenuptial agreements as a mechanism to protect individual assets and property acquired prior to marriage. This step also emphasizes the government's responsibility to ensure that individuals' rights are safeguarded against unforeseen circumstances. To avoid potential conflicts regarding the division, ownership, or entitlement to assets brought into a marriage or acquired during it—whether individually or jointly—spouses are advised to create a prenuptial agreement. This agreement should clearly outline the principles governing the management of shared marital assets and individually owned property. Maintaining proper documentation is essential, especially when premarital funds are used to establish joint accounts, ensuring the agreement reflects each spouse's contributions and specifies how such joint resources should be managed during the marriage.

Prenuptial agreements can also address matters concerning children. For instance, when one spouse has children from a prior relationship, the agreement can protect those children's rights to the parent's assets. Such provisions may include safeguards to ensure inheritance rights remain intact in the event of the parent's death or divorce. In these cases, prenuptial agreements may incorporate clauses that act as testamentary instructions, setting conditions for succession. However, while they can address inheritance concerns, they typically cannot determine child custody, visitation arrangements, or support obligations in case of separation.

Including clauses that establish the expected dynamics of the marital relationship can also prove beneficial. Such agreements help ensure that neither partner's autonomy is compromised by the other. Open discussions about each partner's expectations and responsibilities can facilitate a clear understanding of roles within the marriage.

The flexibility of prenuptial agreements, owing to their contractual nature and absence of a rigid legal format, allows for significant customization. Couples can leverage this adaptability to incorporate lifestyle clauses, which may include agreements on living arrangements, personal values, and standards to be upheld during the marriage.<sup>72</sup>

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<sup>67</sup> AIR 1959 SC 906

<sup>68</sup> *Pran Mohan Das v. Hari Mohan Das*, AIR 1925 Cal 856.

<sup>69</sup> AIR 1970 J&K 27.

<sup>70</sup> 2016) 6 Bom CR 567

<sup>71</sup> 666 So. 2d 246; (Fla. Dist. Ct. App. 1996)

<sup>72</sup> Van A. Larson PC, Lifestyle Clauses Becoming More Popular in Prenuptial Agreements, May 31, 2014, available at <http://www.vanlarsonlaw.com/kane-county-attorney/2014/05/31/lifestyle-clauses-becoming-popularprenuptial-agreements/>

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**Conclusion :**

In recent times, there has been a notable rise in divorce cases across the globe. Prenuptial agreements, widely recognized in Western countries, are gradually gaining acceptance within the Indian context. These agreements serve as a practical tool for safeguarding personal assets, family businesses, and properties acquired prior to marriage. They also simplify the division of property and reduce the complexity of litigation in cases of marital dissolution. For couples seeking to avoid lengthy legal disputes in the event of divorce, a prenuptial agreement proves to be a prudent choice.

Such agreements can also function as a memorandum of understanding, establishing a legal framework between spouses. To ensure their validity, certain essential conditions must be met, including the free consent of the parties, the agreement being documented in writing, proper registration, and full disclosure of pre-existing debts, among other requirements.

In the Indian context, there is a pressing need for clear legal guidelines or provisions governing prenuptial agreements. Notably, these agreements are already recognized under Muslim and Christian marriage laws, as well as under the Indian Contract Act.

Marriage holds a significant place in Indian tradition, raising concerns that prenuptial agreements might undermine the sanctity of Indian families. However, it is worth reevaluating this perspective in light of developments in matrimonial law both within India and globally, as highlighted in this paper. Allowing spouses the opportunity to mutually outline their expectations and responsibilities in a structured format not only fosters transparency but also establishes a balanced foundation for the relationship. This approach can play a crucial role in safeguarding the interests of both partners, particularly women, who are often more vulnerable to marital inequities in the Indian context.

While there is significant potential for developing prenuptial agreements tailored to meet the specific requirements of Indian couples, the lack of explicit legislative provisions in this area creates a considerable obstacle. This absence hinders the use of such agreements as effective tools to address the nuanced aspects of marital relationships. Unfortunately, a reluctance to acknowledge the advantages of incorporating prenuptial agreements within the marital framework—often due to outdated perspectives—and the State's failure to actively deliberate on their regulation and recognition impede couples in India from consensually defining the terms of their marriage.

As discussed in this paper, several key criticisms levelled against prenuptial agreements can be effectively countered. It has also been established that such agreements are not inherently incompatible with the existing legal framework in India and can be structured to align with established legal principles. Additionally, the successful implementation of prenuptial agreements in various countries demonstrates the feasibility of introducing and enforcing similar provisions in India.

Marriage holds a significant place in Indian society, and there is a prevailing apprehension that prenuptial agreements could disrupt the traditional familial structure. However, this position warrants reconsideration in light of evolving developments in family law, both within India and internationally, some of which have been highlighted in this paper. Allowing spouses the autonomy to collaboratively outline their expectations from each other and the marriage could promote equality in the relationship and safeguard both parties, particularly the female spouse, from injustices commonly encountered in Indian marital dynamics.

The contractual nature of prenuptial agreements allows for some interpretation under the Indian Contract Act, 1872. However, Indian personal laws do not currently provide adequate guidance on such agreements. This raises the question of whether it is appropriate to treat prenuptial agreements as purely commercial contracts in the Indian context. Such an approach may not be ideal, as prospective spouses are often guided by altruism and goodwill when entering into these agreements, rather than by a commercial bargaining mindset. Moreover, unlike commercial arrangements, marital relationships involve future uncertainties, unforeseen challenges, and evolving circumstances. Planning for the dissolution of a marriage that has yet to commence involves envisioning a dynamic relationship, making it challenging to account for all potential variables.<sup>73</sup>

It is imperative to engage in a thorough examination of how prenuptial agreements should be regulated in India. Once appropriate regulations are developed, they ought to be integrated into the Indian legal framework, replacing the current fragmented judicial approach to such agreements. Additionally, given the absence of a definitive ruling from the Supreme Court of India regarding the validity and scope of prenuptial agreements, the issuance of an executive guidance note or the inclusion of specific legal provisions within personal laws addressing these agreements would be a significant step forward. We urge the Indian legislature and executive to recognize the growing relevance of prenuptial agreements in contemporary Indian marriages. Legal acknowledgment of these agreements, alongside the development of model templates outlining permissible and enforceable terms, could provide couples with clear and practical references while drafting their own agreements.

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<sup>73</sup> Margaret Ryznar and Anna Stepien-Sporek, To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context, 13 *Cha I. Rev* 27 (2009-10).