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## Prenuptial Agreements: Status & Validity

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*The view of marriage in today's world is changing from what it was in the past. Gone are the days of unnecessary compromise to keep a marriage afloat. People today are more concerned with their personalities than with the false image of a stable relationship, whereas the scenes behind the curtain show a very different picture. As divorce rates throughout the world continue to rise, it is becoming increasingly important to deal with post-divorce conditions. Pre-marriage agreements around the world are becoming more and more common, as new generations divide at higher prices than previous ones. This study looks at the concept of pre-marital agreements around the world on different continents. The study then moved on to the Indian perspective and looked at the agreements of the general public.*

**Keywords:** *pre-nuptial agreements, matrimony, maintenance, divorce.*

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### INTRODUCTION

Pre-nuptial agreements or 'precedents' are agreements made between two people who marry. The Cambridge Dictionary defines "prenuptial agreements as an official document signed by a pre-marital couple stating what will happen to their property and/or children if they divorce."<sup>1</sup>

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<sup>1</sup> Cambridge Dictionary, 'Prenuptial Agreement' (@CambridgeWords, 21 December 2022)

<<https://dictionary.cambridge.org/dictionary/english/prenuptial-agreement>> accessed 21 December 2022

Since marriage in many cultures is viewed as a two-way street, the prenup refers to a state in which a person is separated from his union. It is a legal agreement that specifies how property, debts, and child custody would be divided in the case of a divorce or judicial separation. The clauses can include the amount of alimony & maintenance on the ground of the breakdown of the marriage.

Prenups are becoming increasingly popular every day. The reason for this is that the number of divorces has been increasing over the years. Between the 1960s and the 1970s, there was a sharp rise in the number of divorces. About 5-8 percent of marriages end in divorce.<sup>2</sup> This has made it clear that the division of children's property and the custody of children are complex battles to be fought. Therefore, an agreement or a simple agreement that resolves such issues should be made if it is to be addressed.

## GLOBAL STATUS OF PRENUPTIAL AGREEMENT

Prenuptial agreements continue to be popular in various parts of the world. Laws vary from country to country as to what they do not include and under what circumstances a prenuptial agreement can be considered non-binding, such as one signed under fraud, hardship, or without proper disclosure of assets. The names of the few countries are as follows:

### UNITED KINGDOM

In *Radmacher v Granatino*,<sup>3</sup> the Supreme Court of the United Kingdom was asked to rule on a pre-nuptial agreement that forbade spouses from asserting claims to the other's assets in the instance of a divorce. The Supreme Court thought that prenuptial agreements do not violate any public policies and are legal as long as neither party is treated unfairly as a consequence of the agreement. Unless shown contrary, the Court believes that there is a presumption of fairness.<sup>4</sup>

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<sup>2</sup> Esteban Ortiz-Ospina & Max Roser, 'Marriages and Divorces' (*Our World in Data*, 25 July 2020) <<https://ourworldindata.org/marriages-and-divorces>> accessed 18 December 2022

<sup>3</sup> *Radmacher v Granatino* 2010 UK SC 42

<sup>4</sup> Rohin Dubey, 'Are Pre-Nuptial Agreements Enforceable?' (*Bar and Bench - Indian Legal News*, 21 August 2021) <<https://www.barandbench.com/columns/are-pre-nuptial-agreements-enforceable>> accessed 18 December 2022

The Supreme Court outlined three elements that would improve the chances of a prenuptial agreement being recognized lawfully by the court. Some of those are:

- Every party to the contract must have the legal capacity to enter into it.
- The ramifications of the agreement must be fully understood by both parties.
- It is not unreasonable to expect the parties to live according to their agreement under the given conditions.<sup>5</sup>

## SINGAPORE

Singapore has traditionally adhered to English law, which forbids prenuptial agreements. In the case of *TQ v TR and another*, the highest Court of Appeal of Singapore upheld the legality of a prenuptial agreement about how to split property when a couple gets divorced. In its decision, it was decided that it would typically carry out foreign agreements before marriage. The court ruled that as long as the contents of a prenuptial agreement between foreign residents subject to foreign law do not conflict with Singapore's civil policy, Singaporean courts must give them appropriate consideration.<sup>6</sup>

The Court of Appeal held in *TQ v TR & another* appeal<sup>7</sup> that any matrimonial arrangement, whether pre-nuptial or post-nuptial, touching the distribution of marital property, the maintenance of an ex-wife, or any other issue, is always amenable to judicial scrutiny.<sup>8</sup> In another contract, the validity of a prenuptial agreement must be governed by its "appropriate" law. The Singaporean courts have required that a marriage agreement complies with all contract law standards to be enforceable, and when it is presented before the court, it must meet the ground of validity. Conforming to the decision in *Chia Hock Hua v Chong Choo Je*, a

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<sup>5</sup> 'Validity of Pre-Nuptial Agreements in India - IPleaders' (*iPleaders*, 29 January 2021)

<<https://blog.ipleaders.in/validity-of-pre-nuptial-agreements-in-india/?amp=1>> accessed 19 December 2022

<sup>6</sup> 'PRENUPTIAL AGREEMENTS in SINGAPORE | the Law Office of Jeremy D. Morley' (*International-divorce.com*, 2022) <<https://www.international-divorce.com/prenuptial-agreements-in-singapore>> accessed 19 December 2022

<sup>7</sup> *TQ v TR & Anr* [2009] 2 SLR(R) 961

<sup>8</sup> Wai Kum Leong, 'The Law in Singapore on Rights and Responsibilities in Marital Agreements' [2010] Singapore Journal of Legal Studies 107

matrimonial agreement must follow contract law requirements to be enforceable. Any agreement that does not correspond to these guidelines will not be upheld in court.<sup>9</sup>

## ITALY

In Italy, prenuptial agreements have to be signed in the presence of a legal representative, unless the couple wants a state of complete alienation. To the extent that they are not prohibited by public policy, prenuptial agreements that are valid under international law may be enforced in Italy. If the couple does want a state of complete alienation, they have the option of making a declaration in front of the person solemnising their marriage at the time of their wedding, and then the information has to be included on the marriage certificate. Foreign law references are permitted only if the established standards are fulfilled, including properly stating the foreign law in the contract.<sup>10</sup>

## AUSTRALIA

In the year 2000, for the first time in Australia, the Family Law Amendment Act 2000 made prenuptial agreements, commonly known as "binding financial agreements," enforceable. Part VIII A of the Family Law Act has specific requirements for the regulation of such agreements by family law lawyers.<sup>11</sup> A court may invalidate a prenuptial agreement in a plethora of circumstances, including the following: where independent legal counsel was not sought or provided before the execution of agreements, Non-disclosure of assets, unconscionable behaviour, duress, etc.<sup>12</sup>

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<sup>9</sup> *Ibid*

<sup>10</sup> 'PRENUPTIAL AGREEMENTS in ITALY | the Law Office of Jeremy D. Morley' (*International-divorce.com*, 2022) <<https://www.international-divorce.com/prenuptial-agreements-in-italy>> accessed 19 December 2022

<sup>11</sup> 'FAMILY LAW AMENDMENT ACT 2000 NO. 143, 2000 - SCHEDULE 2 - Financial Agreements' (*Austlii.edu.au*, 2022) <[http://classic.austlii.edu.au/au/legis/cth/num\\_act/flaa2000194/sch2.html](http://classic.austlii.edu.au/au/legis/cth/num_act/flaa2000194/sch2.html)> accessed 19 December 2022

<sup>12</sup> Fernanda Dahlstrom, 'Thorne v Kennedy - Prenuptial Agreements: Bad Contracts and Poor Behaviour' (*Go To Court*, 9 August 2022) <<https://www.gotocourt.com.au/family-law/thorne-v-kennedy-prenuptial-agreements-bad-contracts-poor-behaviour/>> accessed 19 December 2022

## **LEGAL STATUS OF PRENUPTIAL AGREEMENTS IN INDIA**

Prenuptial agreements, despite their unclear legal status in India, are becoming more common as the country makes the transition from a hierarchical to a more egalitarian culture. In India, Hindus are governed by the Hindu Marriage Act of 1955. Hinduism regards marriage as a sacrament that unites two souls for the duration of their lives. Hindus, unlike Muslims, do not consider marriage as a contract; hence, prenuptial agreements are uncommon in the Hindu religion. Therefore, the practice of prenups is not prevalent in Hindu society.

### **THE INDIAN CONTRACT ACT, OF 1872**

If both adult couples sign the agreement mutually and if it is free from ambiguity and does not undermine the rights of any party, then it's open to the court to consider the agreement valid. Even if all of the prerequisites for a legal contract under Section 10 of the Indian Contract Act, of 1872, are satisfied, if the terms of the agreement are contrary to public policy, the contract is invalid. According to Section 23 of the Indian Contract Act of 1872, any contract that contravenes public policy is regarded as unlawful and void.

### **THE SPECIAL MARRIAGES ACT, OF 1954**

Prenuptial agreements are regarded as legally binding under the Special Marriage Act of 1954 if a marriage is solemnised and all declaration documents are properly registered at the Registrar's Office.

### **THE DIVORCE ACT, OF 1869**

Prenuptial agreements are specifically mentioned only in Section 40 of the Divorce Act of 1869, one of the few personal law rules that regulate Christians. In this section, it is stated that the presence of pre-marital or post-marital agreements would be taken into consideration by the District Court before a decision is made on dissolving the marriage. Only in Goa, the only state where couples may enter into prenuptial agreements about the division of property before getting married.

## THE PUBLIC POLICY VIEW OF PRENUPTIAL AGREEMENTS IN INDIA

The judicial system of India does not approve prenuptial agreements as valid contracts. Because marriage is not regarded as a contract under Indian law, a prenuptial agreement cannot be considered legally binding in this country. Additionally, there are no specific regulations that regulate prenuptial agreements.

- Prenups are regarded as conflicting with 'public policy'<sup>13</sup> and are not applicable in terms of Section 23 of the Indian Contract Act, of 1872.<sup>14</sup>
- It is not subject to the Hindu law of marriage or any other personal laws since it is governed by the conventional law of contract. For the contract to hold up in court, it must comply with the requirements of Section 10 of the Indian Contract Act, of 1872.

The Hon'ble High Court of Calcutta, in the case of *Tekait Mon Mohini Jemadai v Basanta Kumar Singh*,<sup>15</sup> had held, 'Marriage under the Hindu Law is a contract, it is also a sacrament, it is more religious than secular in character; the union is indissoluble, for it is a union of flesh with flesh, bone with bone.'<sup>16</sup> However, a prenuptial or postnuptial agreement dictating the rights of parties after marriage is not the same as an agreement to live apart temporarily during the marriage. Such an agreement like that seems to go against public policy, Court held.<sup>17</sup>

This prenuptial agreement was upheld by the court in the case of *Sunita Devendra Deshprabhu v Sita Devendra Deshprabhu*.<sup>18</sup> In this particular case, the issue that was brought before the Honorable High Court of Bombay was over the dividing of assets between the parties. However, the court was made aware of the existence of a prenuptial agreement, and the court did take this agreement into account while considering the division of assets.

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<sup>13</sup> *ONGC Ltd v Saw Pipes Ltd* 2003 (2) Raj 1 (SC); *Kedar Nath Motani v Prahlad Rai* AIR 1960 SC 213

<sup>14</sup> Indian Contract Act 1872, s 23

<sup>15</sup> *Tekait Man Mohini Jemadi v Basanta Kumar Singh* (1901) ILR 28 Cal 751

<sup>16</sup> *Ibid*

<sup>17</sup> *Ibid*

<sup>18</sup> *Sunita Devendra Deshprabhu v Sita Devendra Deshprabhu* (2016) 6 Bom CR 567

In the case of *Krishna Aiyar v Balammal*<sup>19</sup>, the husband filed a petition before the court for the restoration of his conjugal rights. Shortly after the case was first brought, the couple reached an agreement to continue their marriage, and the husband promised his wife that he would pay her alimony if they ever divorced in the future. Despite the arrangement, the wife never returned to married life. Nonetheless, it is important to note that the Madras High Court considered the disputed agreement to be illegal, reasoning that it breached the sacraments of the marital obligation of Hindu law.<sup>20</sup> In addition, the court ruled that the agreement violated public policy since it contemplated a future separation.

The Hon'ble Madras High Court in the case of *Thirumal Naidu v Rajammal Alias Rajalakshmi*<sup>21</sup> dealt with the issue of whether a prenuptial agreement between the husband and wife not to stay together conflicts with the woman's claim for restoration of conjugal rights. The court cited the Krishna Aiyar case<sup>22</sup> and concluded that a prenuptial agreement for future separation is against public policy and is, thus, illegal since, Hindu law treats marriage not only as a contract but also as a 'sacrament'. In India, in the case of *Bai Fatma v Ali Mahomed Aiyab*,<sup>23</sup> the observation made by the court was that an agreement that provides for future maintenance in the event of future separation is void because it is in contravention of public policy.

In the case of *Khatun Bibi v Rajjab*,<sup>24</sup> one of the conditions laid down was that, in breach of the prenuptial agreement, the husband was obligated to reside at the home of the mother-in-law. The High Court of Allahabad declared it invalid because it was improper to restrict the liberty & freedom of the husband, hence it goes against the principles of public policy. On the other hand, the Jammu and Kashmir High Court also held that an agreement stipulating payment of a particular amount in consideration for leaving the house of the father-in-law and permitting divorce if the money was not paid was not adverse to public policy.<sup>25</sup>

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

<sup>20</sup> *Ibid*

<sup>21</sup> *Thirumal Naidu v Rajammal Alias Rajalakshmi* (1967) 2 MLJ 484

<sup>22</sup> *Aiyar* (n 19)

<sup>23</sup> *Bai Fatma v Ali Mahomed Aiyab* (1912) 14 BomLR 1178

<sup>24</sup> *Khatun Bibi v Rajjab* AIR (1926) All 615

<sup>25</sup> *Mohd Khan v Shahmali* AIR (1972) J&K 8

## THE PRENUPTIAL AGREEMENT IN ISLAM

A Nikahnama, an Islamic marriage contract, is a pre-nuptial agreement that outlines the 'rights' and 'obligations' of the spouses and stipulates the conditions to be included to protect the rights of a woman in marriage. Polygamy, or the practice among Muslim men of taking up to four wives during their married life, as long as the man treats his wives equally, is a common Sharia practice.

In Muslim countries, polygamy is legal when all four wives have the same legal status and benefits as the first wife, but in Western countries such as the US and UK, polygamy is illegal when other wives do not have the same legal benefits as the first wife.<sup>26</sup> The bride-to-be can negotiate the status of their future marriage in their prenuptial agreement. If she doesn't feel uncomfortable having a husband with many wives, she can state that in her marriage contract. Violation of such an agreement may be grounds for divorce from the first wife.<sup>27</sup>

Mahr is a dowry given by the groom to the bride before or just after the wedding. It might be in the form of monetary compensation or tangible assets that will benefit the wife. This is a woman's right in Islamic culture, where Mahr can be used for the wife's living expenses in case of divorce or whatever she wants. The payment of the Mahr must be stipulated in the prenuptial agreement and payment conditions. One of the rights of women in Islamic marriages is their right to financial independence, which is enshrined in their marriage contracts.<sup>28</sup>

The amount of money they have accumulated before, during, and after the marriage is theirs alone, and they have no obligation to provide for their spouses in the event of divorce or marriage breakdown. Muslim law upholds the principle that a wife's property is hers alone, and she is not obligated to share such property unless it is stipulated in the prenuptial agreement.

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<sup>26</sup> 'Prenuptial Agreements and Islamic Women's Rights in the US and UK | Free Essay Example' (StudyCorgi.com, 29 September 2022) <<https://studycorgi.com/prenuptial-agreements-and-islamic-womens-rights-in-the-us-and-uk/>> accessed 19 December 2022

<sup>27</sup> *Ibid*

<sup>28</sup> '[PDF] the EFFECT of ISLAMIC FAMILY LAW on NORTH AMERICAN FAMILY LAW ISSUES - Free Download PDF' (Silo.tips, 2016) <<https://silo.tips/download/the-effect-of-islamic-family-law-on-north-american-family-law-issues>> accessed 19 December 2022



Another advantage of prenuptial agreements is that they give women the right to a good education, and they can even go on to further study and get a higher education.<sup>29</sup>

## CONCLUSION

A prenuptial agreement is a wise decision in today's society when relationships often fail. While such agreements are widespread in Western countries, they have yet to be completely accepted in India. The Indian community has yet to comprehend and interpret the essence of such agreements. Since 2016, such agreements have been more prevalent among capitalists and wealthy families. The implementation of this method in India would lead to amicable methods of settling marital disputes.

Prenuptial agreements have a lot of potential to be tailored to the requirements of Indian couples, but the lack of clear statutes on the subject could make it hard for them to be used as useful tools for figuring out how a marriage works. More individuals in urban areas are interested in this because they believe that it would help them avoid matrimonial troubles and cover any unforeseen challenges that may arise. Prenuptial agreements do not, however, undermine Indian culture or public policy, and it's in the public interest to offer such a "*need of the hour.*"

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<sup>29</sup> 'Prenuptial Agreements and Islamic Women's Rights in the US and UK | Free Essay Example' (n 26)