

# Prenuptial Agreements in the Institution of Marriage in India: Legal Framework & Societal Perceptions

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**Abstract:** In modern culture, prenuptial agreements represent a significant shift from traditional marital customs to a more popular strategy. Such agreements are effective in navigating potential risks and enhance communication among future spouses. These agreements embody a strengthened framework of legal protection that guarantees that the financial interests of both parties are respected, while also easing the financial burdens and emotional difficulties linked to the divorce process. Current research examines prenuptial agreements in Hindu marriages in India revealing the possible pathways beyond customary laws. It also highlights the significance of customs in Hindu marriages and growing interest in prenuptial agreements among young couples. It is suggested to implement a well-defined legal framework which aligns traditional marriage with modern requirement. In India, prenuptial agreements are subject to inconsistent and ambiguous legal provisions. Although there are no particular provisions for prenuptial agreements in personal laws, they may fall under the purview of contract law or the 'Indian Contract Act, 1872. Courts have generally held them unlawful on public policy grounds. In India, marriages are governed by Hindu marital traditions.

**Keywords:** prenuptial agreements; Hindu marriage act; Indian marriages; Indian law

## 1. Introduction

The institution of marriage has been a fundamental aspect of every society and culture globally, transcending geographical and religious boundaries. Marriage represents a significant social and legal partnership between two individuals, fostering a cooperative and balanced relationship (Gandhi 2008). Historically, every civilization has experienced transformations in the institution of marriage (Upendra 2018). A marriage intends to foster a secure environment for communities and families (Tahi 2021). The creation and adaption of prenuptial agreements are quite new in the Indian culture, where traditions, customs, and legal systems are firmly ingrained in a complex cultural tapestry. In prenuptial agreements, the agreement between prospective spouses is to be solemnized before a proposed marriage. These agreements state the rights and liabilities of spouses especially in financial matters, e.g., the listing of properties, procedure of divorce, or conditions to adopt a child with the consent of both parties. Uncertainty in relationship between spouses is the major reason behind prenuptial agreements. It protects wealth and assets acquired prior to marriage, shields spouses from each other's debt, protects the family business, allows the continuation of professional practice, provides for child custody, and lays out divorce procedure (Kumar 2018).

These agreements ensure that the parties to a planned marriage may identify a way to resolve any potential conflicts. Due to their financial safety measures against unforeseen future calamities, people of every income group can sign such agreements. Prenuptial agreements are becoming popular, as society is changing, and spouses are concerned about maintaining their individuality and careers after marriage (Kumar 2018). These are the least expensive alternative as compared to divorce or court-related lawsuits for maintenance, and adoption. Their process is less formal than going via the judicial system. With mutual consent, parties can add terms that suit them. Such agreements protect from fraud and any misrepresentations made by either spouse, protecting parties from unpleasant situations (Kumar 2015).

Prevalent in the West, prenuptial agreements are still at infancy stage in India, making it challenging for Indian couples to follow this trend (Johari 2015). The legality of prenuptial agreements in India has not been debated comprehensively due to legislative's lack of interest in pertinent laws or policies and the judicial community's ambiguity regarding the matter.

Current research explores the complexities of prenuptial agreements in India, and the factors contributing to their growing adoption among Indian couples. Prevalent perspectives and opinions

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regarding the increasing notion of prenuptial agreements and the legal structure governing such agreements in India will be discussed.

## 2. Methods

Doctrinal method based on secondary material has been used in current study. Relevant laws, court decisions, review and research papers, news pieces, and online resources were consulted.

## 3. Concept and Meaning of Prenuptial Agreement

Prenuptial agreements are perceived as not aligning with the values and customs of traditional Indian culture. A particular segment of society has critical views towards individuals who engage in arranged marriages without prior acquaintance with their partners (Saxena and Lal 2014). These people believe to be adequately prepared for any possible scenario after marriage (Kumar 2015). If divorced or separated, this contract specifies how the couple's assets and obligations would be shared. Prenuptial agreements have gained traction in the West, influenced by the lifestyles of Hollywood superstars. Prenuptial agreement is a relatively new concept that is being popular in India due to the evolving value systems and lifestyles.

Prenuptial agreements can address a wide variety of financial and personal issues, such as property partition, spousal support, inheritance rights, and the management of financial assets and obligations. Prenuptial agreements provide clarity and reduce possible conflicts in the case of an unhappy marriage. These agreements protect spouses from each other's debt, safeguard the family companies, allowing the continuation of professional practice, helping in children custody, and laying out divorce procedure in advance.

## 4. Historical Background of Prenuptial Agreement

Prenuptial agreements referred as marriage contracts, have a rich historical pedigree dating back more than 2,000 years, with origins believed to date back to ancient Egypt. These agreements, whether written or oral, were primarily designed to establish the assets that each partner brought into the marriage, thereby laying the groundwork for financial expectations and responsibilities (Hegde 2023).

Premarital agreements are as old as humans themselves. In ancient Egypt, contracts served to delineate an individual's property and financial obligations after his death. The Code of Hammurabi in ancient Mesopotamia (about 1754 BC) had rules for marital settlements, including property transfer. The Roman Empire also had a kind of premarital agreement called sponsalia or sponsio, which specified the terms and conditions of marriage.

The development of prenuptial agreements took a turning point with their adoption by royal families, who recognized the need to protect their property and lineage through formal contracts. A notable example from the 15<sup>th</sup> century was the 'prenuptial agreement' signed by Edward IV of England and Eleanor Butler. This agreement not only highlighted the importance of financial arrangements in royal marriages, but also set a precedent for the use of prenuptial agreements among the aristocracy.

Prenuptial agreements became popular in the US and Western countries during the twentieth century (Leeson and Joshua 2016). In July 1983, National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted the Uniform Premarital Agreements Act and urged all states to adopt it. The Act was intended to provide consistency of content and enforcement nationwide, while accommodating the flexibility required in modern marriages.

This act specifies specific conditions for prenuptial agreements to be enforceable under the act. Section 3 of the Uniform Premarital Agreement Act states that "agreements may govern the use, ownership, and disposition of real and personal property both during and after the marriage whether it terminates by death of a spouse or divorce. Section 3(a)(8) permits the parties to include "any other matter, including their personal rights and obligations, not in violation of public policy or any statute imposing a criminal penalty" (Kumar 2015).

Prenuptial agreements were not legally binding under English law. The Matrimonial Causes Act 1973 empowered the courts regarding ancillary remedies, including the ownership of marital property, maintenance payments, pension transfers, and the issuance of financial instructions following a divorce. Separation agreements gained legal recognition in the late 1920's, particularly highlighted by *Hyman vs. Hyman*.<sup>1</sup> Restricting marital courts from exercising their jurisdiction to grant financial remedies through these agreements were ultimately ruled unconstitutional. The Hyman concept was later embraced in the Matrimonial Causes Act 1973. The English Law Commission has addressed the uncertainties of premarital and 'postnuptial agreements. The commission expressed that marital arrangements ought not to be seen as contracts, thereby constraining the court's ability to render suitable judgments (Hegde 2023). Marriage in India, is a holy relationship between husband and wife. The divorce ratio is increasing in the country (Sethi and Thomas 2018).

However, there is considerable variation in the acceptance and implementation of premarital agreements across different cultural and legal spheres. Prenuptial agreements are not commonly practiced in India and often do not align with traditional marriage customs and beliefs, which are considered a sacred institution in Hindu tradition. The Indian legal system has not set any significant precedents regarding the enforceability of 'prenuptial agreements' nor has the judiciary has yet taken a decisive stance on this issue (Saxena and Lal 2014). While prenuptial agreements can allow couples to clarify their financial intentions, there is no assurance that courts will uphold such agreements, creating uncertainty for those who may be considering them.

Despite this, there was a growing interest in such prenuptial agreements among wealthy family in India, largely influenced by media coverage of celebrity weddings. This trend indicates a possible shift in societal attitudes towards prenuptial agreements, as more and more individuals are beginning to recognize their usefulness in protecting assets and clarifying financial responsibilities. Goa is the only state in India that recognizes prenuptial agreements because it follows the Portuguese Civil Code of 1882, which

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<sup>1</sup> Hyman vs. Hyman (1929), A.C. 601(UK).

allows such contracts to be enforced under specific circumstances. Additionally, prenuptial agreements can be enforced under the Special Marriage Act of 1954, provided that all required documents are fully registered.

## 5. Legal Dimensions of Prenuptial Agreements

Prenuptial agreements, while not specifically covered under personal laws in India, are regulated under section 23 of the Indian Contract Act 1872. These agreements adhere to section 10 of the Indian Contract Act 1872. Courts often consider prenuptial agreements illegal and unenforceable, as these contradict with ‘public policy.’ The courts view them as encouraging separation or modifying the fundamental tenets of personal laws governing marriage.

The prenuptial agreement referenced in section 40 of the “Divorce Act, 1869,” which addresses the ‘dissolution of Christian marriages,’ explicitly indicates that district courts can assess the validity of prenuptial agreements and may take into account the specified terms when determining property settlements in divorce cases (Ghosh and Pratyusha 2019). ‘In *Tekait Man Mohini Jemadi vs. Basanta Kumar Singh*,<sup>2</sup> Calcutta high court determined that a prenuptial agreement mandating the husband to consistently follow his wife’s mother’s instructions and to abstain from removing her from her home was null and void in accordance with public law. Although a substantial corpus of Indian case law raises concerns about the validity of “premarital agreements” in Hindu marriages, it is important to note that numerous courts have made endeavors to uphold the constitutionality of prenuptial agreements (Sethi and Thomas 2018).

The ‘Bombay High Court’ in the case of *Sunita Devendra Deshpabhu vs. Sita Devendra Deshpabhu*.<sup>3</sup> In this particular case, there was a dispute over the division of assets between the parties. However, the Court was aware of the existence of the prenuptial agreement and the Court took this agreement into account when considering the division of assets. In ‘*Pran Mohan Das vs. Hari Mohan Das*’<sup>4</sup>, Calcutta high court held that the prenuptial agreement was legitimate and enforceable; nevertheless, the idea of “part-performance of a contract” limited the plaintiff’s ability to regain the property. Since the arrangement in issue did not fit the requirements of a marriage brokering contract, it was not deemed to be a breach of public policy.

In *Commissioner of Income tax vs. Mansukh Rai*, Calcutta high court held that, the property transfer according to a prenuptial agreement intended to satisfy obligations was equitable and did not violate section 16(3) of the “Indian Income Tax Act 1922.” It has been proposed that relevant authorities approve these agreements, new legislation be enacted to provide legitimacy and establish a regulatory framework for determining which subjects may be managed by these agreements and which will continue to be governed by statute or personal law. In *Thirumal Naidu vs. Rajanimal alias Rajalakshmi*<sup>5</sup> for restitution of conjugal rights, the Madras High Court has been considered the issue of whether a ‘prenuptial agreement’ between husband and wife for not living together, dispute with the woman’s claim to enforce conjugal rights. The Court cited the case of *Krishna Iyer vs. Balammal*<sup>6</sup> to conclude that a ‘prenuptial agreement’ for future separation is against ‘public policy’ and is therefore void, since Hindu law recognizes marriage not only as a contract but also as a sacrament.

## 6. Societal Perceptions and Impact on the Institutions of Marriage

In India, Hindu Marriage has always been a holy relationship between husband and wife. In ancient India, powerful males did not divorce their spouses due to societal pressure. Divorce previously considered a taboo is now increasing. To protect their own money, couples waive their rights under traditional Hindu rules (Kumar 2015). Ketubah marriage contract, a kind of premarital agreement is necessary in Jewish marriages and comprises of the groom’s written promises to acquire the wife’s assets in his death or divorce (Kumar 2015). Prenuptial agreements are often used at weddings since Islam views marriage as a civil transaction (Justice Kedar). For a thorough the legal recognition of prenuptial agreements, Indian Divorce Act 1869,’ the ‘Civil Code of Goa,’ and the case of “*Mozelle Robin Solomon v. Lt. Col. R.J. Solomon* should be consulted. The analysis of the legal framework surrounding marriage and divorce in the Jewish community suggested that Jewish marriage is more as a commercial arrangement than a religious sacrament.<sup>7</sup>

Situation in Goa, particularly in the absence of personal laws due to the universal civil code, is based on the Portuguese Civil Code 1867 is much better. The Portuguese Civil Code includes provisions regarding the distribution of property prior to marriage. In the absence of mutual agreement, it is commonly understood that individuals are perceived as being in a marital relationship. The shared ownership of property ensures that the wife is entitled to a fair share of the assets contributed to the marriage by both parties.

In *Damodar Ramnath Alve vs. Shri Gokuldas Ramnath Alve*,<sup>8</sup> the apex court held that the Portuguese Civil Code plays a significant role in reinforcing the fundamental unit of society and the family, by protecting the rights of children and widows. Prenuptial agreements have been recognized in the respect of Jewish weddings in India within a contemporary public policy framework, similar to their acceptance in Muslim marriages, which are also considered civil contracts (Mulla 2015). From a Christian perspective, Indian courts possess the authority under the Divorce Act to evaluate ‘prenuptial agreements’ when determining the distribution of property for a Christian married couple post-divorce. Prenuptial agreements are sometimes seen as possessing moral obligations, despite the prospective spouse’s awareness of their limited legal enforceability (Sethi and Thomas 2018).

<sup>2</sup> *Tekait Man Mohini Jemadi vs. Basanta Kumar Singh* (1901) ILR 28 Cal 751(India).

<sup>3</sup> (2016) 6 BOM CR 567.

<sup>4</sup> *Pran Mohan Das vs. Hari Mohan Das*, AIR 1925 Cal 856(India).

<sup>5</sup> (1967) 2 Mad LJ 484.

<sup>6</sup> ILR (1911) 34 Mad 318.

<sup>7</sup> Portuguese Civil Code, Government of Goa (1867)

<sup>8</sup> 1997(4)BOMCR653

## 7. Impact on Sanctity of Institution Marriage

Marriage is considered a holy institution that supports the Indian family system. This is seen crucial for the sustained stability of India's civil society (Agarwal 2003). This view of marriage endorses the notion that including prenuptial agreements essentially contracts into a broader definition of marriage may undermine its sanctity. Prenuptial agreements, which allows couples to consider divorce before formal marriage, can disintegrate the structure of Indian marriages (Singh 2023).

Proponents of prenuptial agreements argue that these agreements calm worries that might sour the marriage and serve as safety nets if a marriage collapses (Frawley and Pollock 2019). Prenuptial agreements establish a solid platform for communication, agreement on delicate matters, and complete disclosure of each partner's obligations and liabilities before marriage. Productivity of a family depends on the roles played by each individual spouse. The entities created after marriage, such as children and home, are challenging to quantify, as output is recognized long after the inputs is given.

1. **Sanctity of Marriage:** In India, marriage is often seen as a sacred institution, particularly in the Hindu community, where it is considered a sacrament rather than a mere contract. This traditional view creates resistance to the introduction of prenuptial agreements, as they may be seen as undermining the sanctity of marriage (Bhuraneey 2021). Many critics argue that such agreements may lead couples to anticipate the end of their marriage before it has even begun, potentially making divorce the norm rather than the exception.
2. **Misuse of Emotional Empathy:** Critics argue that one spouse may induce the other to sign an agreement that benefits them financially under the promise that the marriage will be permanent. This can lead to situations where one party, often the man, finds it difficult to challenge the terms of the agreement after the marriage has deteriorated, as they may have agreed to the terms without fully understanding the implications.
3. **Exploitation of Women:** The premarital agreements also highlight the potential for exploitation of women, who may not be fully aware of their legal rights. Even if premarital agreements are designed to comply with laws protecting women's rights, there is a risk that husbands may coerce their wives into believing that they have given up these rights by signing the agreement. This situation raises concerns about the fairness and equality of such agreements, especially for women who may lack legal knowledge or resources.
4. **Contradiction with Public Policy:** Contradiction with public policy in India further complicates the status of premarital agreements. Unless lawmakers provide clear definitions and guidelines about public policy, significant changes in family law, including the recognition of premarital agreements, will be difficult. Currently, premarital agreements have not been integrated into religious laws, and lawmakers may continue to oppose changes citing public policy concerns. This lack of clarity leaves the status of premarital agreements in a state of uncertainty, often relegating them to the provisions of the Indian Contract Act, 1872, without specific legal backing in family law.

## 8. Potential Clauses in Prenuptial Agreements in India

In light of the aforesaid discussion, it is believed that the existence of a signed prenuptial agreement, irrespective of its enforceability, facilitates transparency between couples regarding their expectations from each other, thereby strengthening the marital bond. From a policy perspective, it is argued that documents such as prenuptial agreements can provide long-term benefits to married couples by enhancing their understanding of the dynamics of their relationship during marriage and by delineating the distribution of assets and rights in the marital situation, provided such prenuptial agreements are defined within the bounds of social customs and are conducive to social harmony (Ghosh and Pratyusha 2019). Therefore, we presenting possible clauses that prospective couples may want to consider including in the documents that they view as prenuptial agreements and intend to be bound by such agreement.

1. **Assets clause:** Assets, both movable and immovable, are an important component of household funds. When entering into a prenuptial agreement, marital couples often combine their individual assets together to form a consolidated asset, which they use for mutual use during the period of their marriage. Therefore, such prenuptial agreements may create joint assets, such as joint bank accounts, or assets acquired during the marital relationship such as a family residence or vehicle.
2. **Child Benefit Clause:** While creating prenuptial agreements, provisions relating to child and related issues may also be included. In cases where one spouse has children from previous marriages, the rights of these children to their respective assets can potentially be secured through a prenuptial agreement. The essential terms within the agreement, couples can ensure that in the event of their death during the marriage or during divorce proceedings, child from previous marriages are not deprived of their rightful share in the property.
3. **Spousal Right and Duties Clause:** It is wise to clearly express the dynamics of the marital relationship that each spouse envisions for the other. This expression can help ensure that neither spouse's autonomy is unduly constrained by the other during the marriage. Discussing mutual expectations and clearly stating the terms of the negotiation regarding one's respective rights and duties can facilitate the delineation of roles within the marriage.
4. **Stridhan Protection clause:** While entering into prenuptial agreements, protection of stridhan should be given importance. All gifts received by the wife during a Hindu marriage are considered her stridhan and are her sole property, in which the husband or in-laws are not given any rights. While entering into a prenuptial agreement, this clause will protect the gifts of the wife and ensure that she retains her sole ownership over these properties.
5. **Dispute Resolution Clause:** While entering into prenuptial agreements, a dispute resolution clause should also be included so that any dispute arising out of such agreement can be resolved through mediation, and if not resolved, then such disputes can be resolved through binding arbitration instead of litigation.

Proponents of prenuptial agreements argue that these agreements calm worries that might sour the marriage and serve as safety nets if a marriage collapses (Frawley and Pollock 2019). Prenuptial agreements establish a solid platform for communication,

agreement on delicate matters, and complete disclosure of each partner's obligations and liabilities before marriage. Productivity of a family depends on the roles played by each individual spouse. The entities created after marriage, such as children and home, are challenging to quantify, as output is recognized long after the input is given (Sethi and Thomas 2014). In the absence of any definitive judicial pronouncement from the Supreme Court of India regarding the nature and extent of validity of prenuptial agreements, the formulation of an instructive executive guidance note or the introduction of relevant statutory provisions in the personal laws governing the scope and extent of prenuptial agreements would be welcomed. We hope that the Indian legislature and executive will soon recognize the emerging need for prenuptial agreements in relation to marriage in the present 21<sup>st</sup> century India and not only grant it legal recognition but also consider the formulation of one or more model prenuptial agreements which can then serve as templates of legally valid terms which couples in India can refer to while formulating their own prenuptial agreements.

## 9. Conclusions

Premarital agreements in India reflect a complex and evolving scenario. Premarital agreements are relatively new in India and young individuals seek to protect their financial interests while fostering transparency in their relationships. No legal provision mentions valid requirement to implement "prenuptial agreements" in India. A well-defined legal framework should be designed for the enforcement of premarital agreements in India. This legal evolution should align harmoniously with the cultural values and religious customs of the country to ensure the clarity and acceptance of such agreements. Proper education will help dispel misconceptions, enabling individuals to make informed decisions regarding the adoption of such agreements. These agreements should be carried out without bias, respecting the diverse backgrounds and beliefs of all parties involved. Prenuptial agreements should include culturally and religiously sensitive conflict resolution techniques with mediation or arbitration as an alternative to conventional litigation. Consequently, we propose that there is a need for serious deliberation on how to regulate prenuptial agreements and once such regulations are framed, attempts should be made to resolve such agreements through arbitration and mediation rather than dealing with them through the current judicial modus operandi.

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