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## PRE-NUPTIAL AGREEMENTS: VALIDITY AND SANCTITY

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Rajani Kumari, Ph.D Scholar, School of Law, JECRC University, Jaipur

Dr. Ritu Meena, Assistant Professor-I, School of Law, JECRC University, Jaipur

### ABSTRACT

The idea of prenuptial agreements, or "prenups," is an important nexus of personal liberty and marital law. Indian marriage has been seen as a holy and unbreakable bond, grounded in religion and custom more than in contract since time immemorial. This understanding has influenced legislative and judicial philosophies, leading to ambivalence towards contracts that anticipate financial or custodial arrangements upon the failure of the marriage. Nonetheless, widespread socio-economic changes, globalization, and increased divorce rates make it necessary to rethink the above traditional approach.

A prenuptial agreement, in essence, is a contract signed between potential spouses before marriage, setting out property rights, financial obligations, and risks like maintenance or division of property on divorce. In most jurisdictions like the United States, the United Kingdom, and some countries in Europe, prenuptial agreements are valid and enforceable under particular statutory regimes subject to protection such as voluntariness, complete disclosure, and equity. Prenuptial agreements have various purposes like limiting litigation, safeguarding family and business assets, and providing economic security for vulnerable wives.

In India, however, there is no certainty regarding enforceability. Regulated under *the Indian Contract Act, 1872*, and limited by personal law and public policy concerns, prenups tend to be struck down by the courts when seen to be against the sanctity of marriage or statutory rights like maintenance under Section 125 of *the Code of Criminal Procedure, 1973*. In spite of this, there is increasing academic and policymaker discussion supporting their endorsement, particularly in the context of interjurisdictional marriages, significant assets, or second marriages.

This study critically analyses the sanctity and validity of prenuptial agreements in India, analyzing statutory constraints, judicial understandings, and doctrinal issues. It also makes cross-country comparisons of the best practices to make recommendations on bringing balance between autonomy and fairness. The argument is made that properly regulated prenups are possible and reconcilable with the traditional mores of marriage so that there is lucidity, fairness, and certainty in law in a contemporary matrimonial context.

**Keywords:** *Prenuptial, Validity, Sanctity, Autonomy, Marriage.*

## 1. Introduction

Marriage as an institution has drastically changed over the centuries from being solely a sacramental union to one that increasingly includes contractual aspects. Traditionally, in Indian culture, marriage was viewed as a *samskara*, a sacrament marked by perpetuity and moral responsibilities but not as a transactional deal.<sup>1</sup> *The Hindu Marriage Act, 1955*, and other personal laws embodied this principle by situating marriage in the matrix of mutual responsibilities and barring contracts that could militate against its perpetuity.<sup>2</sup> But with the realities of contemporary life, including high divorce rates, sophisticated financial arrangements, and greater female involvement in economic activity, the conventional views about marital relationships have come under pressure.<sup>3</sup>

A prenuptial contract, also referred to as a "prenup," is an agreement between future spouses prior to marriage that stipulates rights and obligations with regard to property division, maintenance, and in some instances even custody arrangements during marital failure.<sup>4</sup> Its major aim is to ensure clarity, minimize litigation, and safeguard individual interests, particularly in high-net-worth marriages or cases involving pre-existing obligations.<sup>5</sup> In nations like the United States of America, the United Kingdom, and Australia, prenuptial agreements have become a prevalent tool for securing financial safety and predictable solutions in matrimonial litigation.<sup>6</sup>

In India, however, there is no certainty regarding the enforceability of such agreements. *The Indian Contract Act, 1872*, controls agreements, but Section 23 states that agreements are void if they run contrary to public policy.<sup>7</sup> Indian courts have always been of the view that agreements inhibiting the marital relationship or foreclosing maintenance against the provisions of a statute are against public policy.<sup>8</sup> For instance, in *Tekait Mon Mohini v. Basanta Kumar Singh*, the Calcutta High Court invalidated an agreement limiting the husband's freedom

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<sup>1</sup> Paras Diwan, *Law of Marriage and Divorce* (5th ed., Universal Law Publishing, 2019) 45.

<sup>2</sup> The Hindu Marriage Act, 1955, No. 25 of 1955, s. 5–7.

<sup>3</sup> Flavia Agnes, *Family Law: Volume I* (Oxford University Press, 2011) 112–15.

<sup>4</sup> Jill Elaine Hasday, *Family Law Reimagined* (Harvard University Press, 2014) 87–90.

<sup>5</sup> Lynn D. Wardle, "Premarital Agreements and the Presumption Against Divorce: Studies in Law Reform" (1991) 39(2) *Journal of Family Law* 1, 15–17.

<sup>6</sup> *Radmacher v Granatino* [2010] UKSC 42; *In re Marriage of Bonds*, 5 P 3d 815 (Cal 2000); *Thorne v Kennedy* [2017] HCA 49 (Australia).

<sup>7</sup> The Indian Contract Act, 1872, No. 9 of 1872, s. 23

<sup>8</sup> Paras Diwan, *Law of Marriage and Divorce* (5th ed., Universal Law Publishing, 2019) 215–18.

of residence on the ground that it was interfering with marital rights and duties.<sup>9</sup> In a similar way, the courts have declined to enforce conditions restricting a right of a spouse to divorce or deciding on child custody in advance, as they are contrary to statutory safeguards under *the Hindu Marriage Act, 1955*, and *the Guardians and Wards Act, 1890*.<sup>10</sup>

Notwithstanding such judicial stances, there is increasing discussion on the necessity to institute prenuptial contracts under Indian law. The reasoning is based upon principles of contractual autonomy and gender justice. Where spouses bring to a marriage substantial personal property, enterprises, or liabilities from previous marriages, prenup can be a safeguard against long-drawn-out litigation.<sup>11</sup> In addition, it can safeguard women from financial uncertainty upon divorce by specifying maintenance in unequivocal terms.<sup>12</sup> *The Law Commission of India Report (2010)* recognized the need for pre-marriage contracts in some situations, without going so far as to advocate legislative reforms.<sup>13</sup>

At a global level, the development of prenuptial agreements is part of a general trend toward contractualization of marriage. In the United States, *the Uniform Premarital Agreement Act (UPAA)* offers a legislative template,<sup>14</sup> whereas English courts in *Radmacher v. Granatino* accepted prenups as influential, but not categorically enforceable. The trends support an increasing recognition that marital autonomy is also the right to determine financial outcomes of marriage.<sup>15</sup>

This study aims to critically analyze if India can adopt a similar model. The discussion starts with the enforceability of prenuptial agreements in Indian law, including judicial rulings, statutory interpretation, and scholarly views, followed by their sanctity as legal documents. It then contrasts approaches between jurisdictions using a framed table and ends with legal reform suggestions balancing autonomy with societal values.<sup>16</sup>

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<sup>9</sup> *Tekait Mon Mohini v Basanta Kumar Singh*, (1901) ILR 28 Cal 751.

<sup>10</sup> *The Hindu Marriage Act, 1955*, No. 25 of 1955, s. 13; *The Guardians and Wards Act, 1890*, No. 8 of 1890, s. 17.

<sup>11</sup> Jill Elaine Hasday, *Family Law Reimagined* (Harvard University Press, 2014) 92–95.

<sup>12</sup> Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (Sage Publications, 1992) 118–20.

<sup>13</sup> Law Commission of India, *Reform of Family Law* (Report No. 242, 2010) para 5.12.

<sup>14</sup> *Uniform Premarital Agreement Act, 1983*, 9C ULA 35 (USA).

<sup>15</sup> Brian H. Bix, *Premarital Agreements: Enforceability and Limits* (Oxford University Press, 2012) 56–60.

<sup>16</sup> Lynn D. Wardle, "Premarital Agreements and the Presumption Against Divorce: Studies in Law Reform" (1991) 39(2) *Journal of Family Law* 1, 20–22.

## 2. Validity of Prenuptial Agreements: Legal Framework

In Indian law, prenuptial agreements are not specifically acknowledged by any legislation. They are enforceable under general principles of contract law subject to restraint under family law and public policy. *The Indian Contract Act, 1872*, under Section 10, states that all agreements entered into by parties capable of contracting for legal consideration and object are valid.<sup>17</sup> But Section 23 pronounces void any agreement whose object or consideration is contrary to public policy or prohibited by law.<sup>18</sup> It has been interpreted expansively by courts to cover agreements that undermine the sanctity of marriage.<sup>19</sup>

In *Tekait Mon Mohini v. Basanta Kumar Singh*, a contract whereby the husband was to live in his in-laws home permanently was declared void as interfering with marital obligations.<sup>20</sup> Likewise, in *Krishna Aiyar v. Balammal*, the Madras High Court declared an agreement restricting a husband's right to marital consortium void.<sup>21</sup> These judgments indicate that Indian courts give precedence to marital obligations over contractual obligations, even if entered into voluntarily.

Still, not every prenuptial provision would automatically offend public policy. Agreements for distribution of property, independent ownership of assets, or business interests could be enforced, subject to the condition that they don't curtail statutory rights like Section 125 of *the Code of Criminal Procedure, 1973*, or personal law provisions like Section 24 of *the Hindu Marriage Act, 1955*.<sup>22</sup> The Bombay High Court in *Sunita Devendra Deshpurabhu v. Union of India* noted that parties have the liberty to settle financial matters within legal limits, although the case involved post-nuptial arrangements.<sup>23</sup>

From a writerly point of view, the case for enforcing prenups is rooted in party autonomy and minimizing matrimonial litigation. The doctrine of freedom of contract, which is at the heart of private law, must extend to marital relationships in issues not specifically forbidden by statute.<sup>24</sup> With the expansion of globalization and more interjurisdictional marriages, India's

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<sup>17</sup> The Indian Contract Act, 1872, No. 9 of 1872, s. 10.

<sup>18</sup> *Ibid* s. 23

<sup>19</sup> *Ibid* at 9

<sup>20</sup> *ibid*

<sup>21</sup> *Krishna Aiyar v Balammal*, AIR 1911 Mad 489.

<sup>22</sup> Code of Criminal Procedure, 1973, No. 2 of 1974, s. 125; The Hindu Marriage Act, 1955, No. 25 of 1955, s. 24.

<sup>23</sup> *Sunita Devendra Deshpurabhu v Union of India*, 2016 SCC OnLine Bom 10049.

<sup>24</sup> P.S. Atiyah, *An Introduction to the Law of Contract* (6th ed., Oxford University Press, 2006) 9–12.

refusal to enforce prenups leads to uncertainty and forum shopping.<sup>25</sup>

### 3. Sanctity of Prenuptial Agreement

The sanctity, when used with prenuptial agreements, denotes respect and enforceability given to these agreements as valid manifestations of party autonomy. Historically, sanctity was for marriage as a social institution, based upon culture and religion.<sup>26</sup> But in an age when personal freedom and freedom of contract have been accorded constitutional recognition under Article 21 of the Indian Constitution, the sanctity of prenuptial agreements is no less important.<sup>27</sup> Prenuptial agreements are not hasty arrangements; they are considered well-considered, voluntary choices by adult partners to formalize their financial conduct in a way that reduces uncertainty and litigation.

In contemporary jurisprudence, *the doctrine of pacta sunt servanda* (promises should be fulfilled) constitutes the foundation of contractual relationships. This rule applies to marriage contracts where not legally forbidden.<sup>28</sup> By signing a prenuptial contract, contracting parties recognize their financial expectations and obligations, promoting openness and trust in the marital relationship. Contrary to the perception that prenups foresee breakdown, prenups possess a preventive role, like insurance policies, by offering protection against unexpected circumstances.<sup>29</sup>

Sanctity of prenuptial agreements also pertains to financial equality within marriage. In most cases, one partner (usually the woman) may forego career opportunities for domestic duties. A prenup drawn up properly can ensure economic security in the case of divorce, avoiding economic imbalance and exploitation.<sup>30</sup> In *Radmacher v. Granatino*, the UK Supreme Court underscored that granting effect to prenups where entered into freely is giving respect to autonomy and fostering fairness. The court held that the function of the law is to guard freedom of choice unless there is an overwhelming consideration of public interest.

On a constitutional level, upholding the sanctity of such contracts is in line with the right to

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<sup>25</sup> Brian H. Bix, *Premarital Agreements: Enforceability and Limits* (Oxford University Press, 2012) 135–38.

<sup>26</sup> Paras Diwan, *Law of Marriage and Divorce* (5th ed., Universal Law Publishing, 2019) 45–48.

<sup>27</sup> *Justice K.S. Puttaswamy (Retd.) v Union of India*, (2017) 10 SCC 1.

<sup>28</sup> P.S. Atiyah, *An Introduction to the Law of Contract* (6th ed., Oxford University Press, 2006) 14–18.

<sup>29</sup> Brian H. Bix, *Premarital Agreements: Enforceability and Limits* (Oxford University Press, 2012) 88–92.

<sup>30</sup> Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (Sage Publications, 1992) 128–31.

privacy and decisional autonomy in *Justice K.S. Puttaswamy v. Union of India*, wherein the Supreme Court reinforced that individuals are at liberty to make intimate personal decisions without unwarranted state intrusion.<sup>31</sup> If individuals can choose their life partners, modes of living, and even medical decisions, denying them the right to determine financial arrangements before marriage appears inconsistent with these constitutional guarantees.

Globally, jurisdictions upholding the sanctity of prenuptial agreements provide measures of protection and not prohibition. For example, in America, the *Uniform Premarital Agreement Act* will make such agreements enforceable if they are voluntarily entered into, in writing, and not unconscionable at the time of signing.<sup>32</sup> Likewise, Australia's *Family Law Act, 1975*, enforces prenups but mandates independent legal advice and disclosure.<sup>33</sup> These measures help confirm that sanctity will never equate to rigidity or injustice but satisfies autonomy with fairness.<sup>34</sup>

For India, recognizing this sanctity is not tantamount to a blanket approval of all prenups. Courts will have to make sure that such contracts do not become tools of compulsion, deception, or gendered disempowerment.<sup>35</sup> Judicial intervention is inevitable in order to ensure fairness and legality. Sanctity is not absolute but contextualized in respect for individual agency but within the normative structure of marriage and statutory entitlements.

#### 4. Comparative Jurisdictional Analysis

| Jurisdiction | Legal Status               | Binding Nature                                   | Requirements            | Public Policy Limitations                 | Notable Case                                                          |
|--------------|----------------------------|--------------------------------------------------|-------------------------|-------------------------------------------|-----------------------------------------------------------------------|
| India        | Not statutorily recognized | Generally unenforceable if against public policy | Contract Act principles | Cannot override maintenance, custody laws | <i>Tekait Mon Mohini v. Basanta Kumar Singh</i> (1901) ILR 28 Cal 751 |
| UK           | Recognized                 | Persuasive,                                      | Free will, full         | Fairness test at                          | <i>Radmacher</i>                                                      |

<sup>31</sup> *Justice K.S. Puttaswamy (Retd.) v Union of India*, (2017) 10 SCC 1.

<sup>32</sup> Uniform Premarital Agreement Act, 1983, 9C ULA 35 (USA).

<sup>33</sup> Family Law Act, 1975 (Cth) (Australia), s. 90B–90KA.

<sup>34</sup> Brian H. Bix, *Premarital Agreements: Enforceability and Limits* (Oxford University Press, 2012) 142–45.

<sup>35</sup> Flavia Agnes, *Law, Justice and Gender: Family Law and Constitutional Provisions in India* (Oxford University Press, 2011) 189–93.

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|--------------------|-------------------------------------------|---------------------------------------|----------------------------------------|--------------------------------------------------|-----------------------------------------------|
|                    | post- <i>Radmacher</i>                    | not strictly binding                  | disclosure, legal advice               | enforcement                                      | <i>v. Granatino</i> [2010] UKSC 42            |
| <b>USA</b>         | Statutorily recognized (UPAA)             | Binding if fair and voluntary         | Disclosure, voluntariness, no duress   | Cannot violate child custody/support laws        | <i>Williams v. Williams</i> , 543 US 1 (2004) |
| <b>France</b>      | Fully recognized                          | Binding                               | Must be executed before notary         | Cannot derogate from parental authority          | Civil Code Art. 1387                          |
| <b>Germany</b>     | Recognized                                | Binding subject to fairness           | Notarial deed required                 | Court may strike down unconscionable terms       | BGB §§ 1408–1412                              |
| <b>Australia</b>   | Recognized under Family Law Act           | Binding if statutory requirements met | Independent legal advice, written form | Must be fair and just                            | <i>Thorne v. Kennedy</i> (2017) HCA 49        |
| <b>Islamic Law</b> | Recognized as <i>Nikahnama</i> conditions | Binding if lawful                     | Conditions must not violate Sharia     | Cannot restrict divorce rights granted by Sharia | —                                             |

## 5. Conclusion and Recommendations

The construction of prenuptial agreements demonstrates a dynamic conflict between modernity and tradition. Indian matrimonial law, influenced by religious and societal norms, still conceives of marriage as a sacrament and not a contract. This notion informs judicial dispositions that tend to deem prenups enforceable as against public policy. Nevertheless, the lived experience of globalization, interjurisdictional marriage, and increasing divorce rates compels a rethinking of this stance.

Currently, the lack of statutory acknowledgment for prenuptial agreements under Indian law generates confusion, resulting in extended litigation and uncertainty for the parties. The confusion also affects foreign nationals or non-resident Indians getting married under the Indian laws, who usually anticipate prenups to have legal implications similar to those at home. Refusal to grant such recognition can discourage legal clarity and justice, especially in cases

with considerable assets, business interests, or second marriages.

### Why Reform is Needed:

- First, contractual freedom is an established principle of private law and a component of personal liberty under Article 21. To deny enforceability to voluntary contracts goes against these principles.
- Second, the current system disproportionately impacts economically weaker spouses, who could end up without proper protection in case of divorce. A prenup, if equitable, can ensure maintenance and avoid penury.
- Third, court calendars are clogged with matrimonial disputes over property and maintenance; enforceable prenups could help curb litigation to a large extent.

### Learning from Comparative Jurisdictions:

The UK, USA, France, and Germany have followed sophisticated structures imposing prenups with limitations based on fairness.<sup>36</sup> Goa, subject to the Portuguese Civil Code,<sup>37</sup> recognizes marital contracts already, thus providing a domestic model for India. Such examples reveal that enforceability does not require derogation from public policy if underpinned by measures like voluntariness, disclosure, and court supervision.<sup>38</sup>

### Recommendations for India:

Statutory Recognition: Enact a legislative provision under personal laws or via a uniform statute, specifically recognizing prenuptial agreements. It could be adapted from *the Uniform Premarital Agreement Act (USA)*<sup>39</sup> or *the Family Law Act (Australia)*<sup>40</sup>, suitably modified to Indian circumstances.

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<sup>36</sup> Uniform Premarital Agreement Act, 1983, 9C U.L.A. 35 (2001); Code Civil [C. Civ.] [Civil Code] art. 1387 (Fr.); Bürgerliches Gesetzbuch [BGB] [Civil Code], §§ 1408–1412 (Ger.).

<sup>37</sup> Portuguese Civil Code, 1867, as applicable in Goa, arts. 1092–1107.

<sup>38</sup> S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (Oxford University Press, 2002) 228–30.

<sup>39</sup> Uniform Premarital Agreement Act, 1983, 9C U.L.A. 35 (2001).

<sup>40</sup> Family Law Act, 1975 (Cth) (Austl.), Part VIIIA.

**Mandatory Safeguards:**

- Voluntariness: The agreement has to be made voluntarily, not under duress or undue influence.
- Full Disclosure: The assets and liabilities of both parties should be disclosed to prevent fraud.
- Independent Legal Advice: Both parties must take independent legal advice to provide informed consent.
- Judicial Review: Courts must continue to have jurisdiction to invalidate clauses that are unconscionable, discriminatory, or against statutory rights like maintenance under Section 125 CrPC or custody provisions of *the Guardians and Wards Act, 1890*.<sup>41</sup>
- Requirement of Registration: Enforce compulsory registration of prenups to provide authenticity and evidentiary value.
- Gender Justice Mechanisms: Special provisions ought to be made to avoid the use of prenups to relinquish maintenance or alimony rights in ways that prejudice women.
- Awareness and Standardization: Government and legal institutions should facilitate awareness and offer model drafts to avert exploitative practices.

In summary, Indian recognition of prenuptial agreements is not a legal reform but rather a social imperative in an age of contractual pluralism and individual autonomy. Rather than eroding the sanctity of marriage, codified prenups can actually support it by dispensing with ambiguity and promoting openness. Indian law must now move from unbending traditionalism to a middle-of-the-road approach that balances

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<sup>41</sup> Code of Criminal Procedure, 1973, No. 2 of 1974, s. 125; Guardians and Wards Act, 1890, No. 8 of 1890, ss. 7–17.

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