
THE MISSING LAW: WHY INDIA NEEDS TO RECOGNIZE PRENUPTIAL AGREEMENTS

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ABSTRACT

Prenuptial agreements are contracts made before marriage to outline the division of assets and responsibilities in case of separation. Though common in many countries, India lacks a clear legal framework for their recognition, making such agreements largely unenforceable. In India, prenuptial agreements face significant limitation due to concerns about public policy, the complexities of personal laws, and an unpredictable judicial approach. There's a rich historical and legal context to this, notably the unique exception of Goa, where such agreements are recognized under the Portuguese Civil Code. A central issue is the conflict between traditional perception of marriage and the increasing need for modern contractual arrangements. Despite this, there's a growing call for legal clarity, and recognizing prenuptial agreements could offer substantial benefits, particularly in protecting individual right.

Formal acceptance of prenuptial agreements would bring India in line with international norms, empower individuals (especially women) within marriage, and provide a practical mechanism for resolving matrimonial disputes. A harmonized legal framework is needed- one that balances contractual freedom with protection against exploitation- to address this notable void in India's family law.

Introduction

As India modernizes, marriage is no longer a union of families but a partnership of equals—where financial independence, shared responsibilities, and pragmatic conversations about money are reshaping centuries-old traditions. A prenuptial agreement (or prenup) is a legal contract made between two people before they get married, outlining how their assets, debts, finances will be divided in the event of divorce, separation, or death¹. It helps protect individual property and clarify financial responsibilities during marriage. Prenuptial agreements are widely accepted and legally enforceable in most western jurisdiction, where they are commonly used to protect individual assets, manage debts and reduce conflicts in case of divorce. Courts in countries like USA, UK, Canada, and parts of Europe generally upholds prenups, provided they are fair, transparent, and entered voluntarily.² While prenups are seen in the west as practical tools for financial clarity and protection. In India, they often clash with cultural and emotional perception of marriage, which traditionally emphasize lifelong unity and family honor over contractual safeguards. This disconnect highlights the tension between evolving legal norms and deeply rooted social values. Prenuptial agreements occupy a unique and uncertain position in India, largely due to country's plural legal framework and deeply rooted cultural values. Unlike many western countries where prenups are legally enforceable contracts, Indian law does not formally recognize them, as marriage is considered a *sacrament rather than contract*, especially under personal laws like the Hindu Marriage Act.³ While prenups are not illegal, their enforceability remains ambiguous— they may be considered under the Indian Contract Act if deemed fair and not contrary to public policy, but courts are not bound to uphold them. Additionally, as discussing financial awareness and global exposure are gradually increasing their acceptance among urban, wealthy and non-resident Indian (NRI) couples. The current landscape in India often leaves couples without a clear legal framework to define their financial future before marriage. This piece explores the existing legal and cultural challenges that effectively sideline prenuptial agreements, rendering them largely unenforceable. We'll delve into the compelling reasons why India needs explicit legal provisions to ensure prenups are valid, enforceable and readily accessible to all couples.

¹ Black's Law Dictionary, 11th ed., defines a prenuptial agreement.

² *Radmacher v. Granatino* [2010] UKSC 42- the UK Supreme Court upheld a prenup agreements as valid, provided it was entered into freely and full disclosure.

³ The Hindu Marriage Act, 1955 does not provide statutory recognition to prenuptial agreements, as marriage is treated as a sacrament not a contract.

Historical and Philosophical Underpinning of Marriage in India-

In India, the legal understanding of marriage varies significantly across different personal laws⁴, influencing the potential for prenuptial agreements. A natural question then emerges: what are the primary obstacles preventing India from legally enforcing prenuptial agreements? A significant answer lies within the complexities of its diverse personal laws-

Under classical Hindu law, marriage is traditionally viewed as a sacrament, a sacred and lifelong union rather than mere contract. This sacramental nature has historically limited the scope for legally enforceable agreements within or about the marriage itself. However, modern statutory law, such as the Hindu Marriage Act, 1955,⁵ has introduced elements of civil law and contract theory, particularly concerning issues like divorce, maintenance, and child custody. Despite these modern introductions, the core concept of marriage as a spiritual bond continues to shape Hindu matrimonial law, often resisting purely contractual interpretations.

Conversely, in Islamic law, marriage (Nikah) is fundamentally regarded as a civil contract not a sacrament. This contractual nature, governed by principles rooted in Sharia and supplemented by acts like the Muslim Personal Law (Shariat) Application Act, 1937⁶ means it is entered into through mutual consent between bride and groom (or their guardians), with clearly defined rights and obligations. A crucial element of this contract is the mahr- a mandatory financial commitment from the groom to the bride, which inherently acts as a prenuptial safeguard. The Nikahnama (marriage contract) further allows for the inclusion of custom condition regarding maintenance, residence, child custody, or even property rights. Because of its contractual foundation, Islamic law inherently provides space for prenuptial agreements, enabling both spouses- especially the woman- to negotiate terms that protect their interest before marriage.

For Christians, the Indian Divorce Act of 1869, which governs divorce, is one of the earliest codified personal laws in this domain.⁷ While the Act does not explicitly recognize prenuptial agreements, Section 40 grants the courts discretionary power to make just and proper orders regarding property between spouses at the time of divorce or separations. Consecutively, courts

⁴ Ministry of Law and Justice, Report on Reform of Family Law in India, 2020

⁵ The Hindu Marriage Act, 1955, Government of India

⁶ Muslim Personal Law (Shariat) Application Act, 1937

⁷ Indian Divorce Act, 1869, Government of India

may consider such agreements related to property if they are deemed fair, mutually consented to, and do not violate public policy.

Lastly, The Special Marriage Act 1954, offers a secular avenue for individuals of different religions or backgrounds to marry without adhering to their personal religious laws⁸. This act promotes a civil, contractual form of marriage registered by the state, aiming for equality and legal uniformity. However, despite its modern and secular framework, the act itself does not contain explicit provisions recognized or regulating prenuptial agreements.

The Indian Contract Act, 1872 and Public Policy

Under Indian Contract law, a core legal principle is that any agreement which is opposed to public policy is void and unenforceable, as codified under section 23 of Indian Contract Act, 1872.⁹ This doctrine serves as a judicial safeguard to ensure that contractual freedom does not extend to arrangements that undermine the welfare of society or violate fundamental rights. In the context of prenuptial agreements, this principle assumes particular importance.

Clauses that seek to waive a spouse's right to maintenance or child support are frequently invalidated on public policy grounds. For instance, in **Tekait Mon Mohini Jemadai v. Basanta Kumar Singh** (1901),¹⁰ the Calcutta High Court held that an agreement restraining a Hindu wife from living with her husband was void, as it was against the public policy and the sanctity of marriage. Similarly, in **Ranjit Kaur v. Kripal Singh**,¹¹ the Punjab and Haryana High court struck down an agreement that barred the wife from claiming maintenance, Indian courts have consistently reiterated that marriage is not merely a civil contract but a sacred institution with moral and legal responsibilities. In **T. Sareetha v. T. Venkata Subbaish**,¹² the Andhra Pradesh High Court emphasized the personal and constitutional dimensions of marital rights and obligations, nothing that any agreement attempting to contract out such rights must be scrutinized closely.

Accordingly, any prenuptial act that encourages separations or limits legal remedies- such as divorce settlements that waive alimony- may be rendered void. In **Smt. Anoop v. Rajesh**, the

⁸ The Special Marriage Act, 1954, Government of India.

⁹ Section 23 Indian Contract Act, 1872, - Any agreement opposed to public policy is void.

¹⁰ Tekait Mon Mohini Jemadai v. Basanta Kumar Singh, (1901) ILR 28 Cal 751

¹¹ Ranjit Kaur v. Kripal Singh, AIR 1980 P&H 191.

¹² T. Sareetha v. T. Venkata Subbaiah, AIR 1983 AP 356

court reiterated that private agreements could not override statutory protections, especially where one party is in a weaker bargaining position.

The Goa Exception: A Beacon of Modernity

While prenuptial agreements are not expressly prohibited under Indian law, their enforceability is highly restricted and is contingent upon conformity with statutory provisions, equity, and public policy. Courts examine that such agreements within the broader legal framework designed to protect the integrity of marriage and ensure that vulnerable spouses- typically women and children – are not deprived of legal safeguards.

How does the legal position of prenuptial agreements in Goa differ from rest of India, and why is Goa considered an exception in terms of their enforceability? *A beacon of modernity in the Indian legal landscape?*

Goa occupies a unique and exceptional position within the Indian legal framework due to its continued application of the Portuguese Civil Code of 1867,¹³ a colonial-era legislation that governs personal laws in the state. This code, which remained intact after Goa's integration into the Indian Union in 1961, establishes a uniform and secular system for regulating marriage, divorce, succession, and property, making it fundamentally different from the personal law regimes followed in the rest of India. One of the most distinctive aspects of this legal framework is the treatment of marriage not merely as a religious or social institution, but as a civil contract with direct implications on the property rights of spouses.

Under this system, couples are mandated to choose and declare their preferred matrimonial property regime before entering into marriage. This declaration is formalized through a legal document similar to a prenuptial agreement, known as a “Deed of Declaration”. Through this, spouses can opt for regimes such as the communion of assets, separation of property, or partial communion, and this agreement is registered with legal effect.

Unlike the rest of India, where prenuptial agreements are generally unenforceable under personal laws on the grounds that they are contrary to public policy or undermine the sanctity of marriage, Goa’s legal system provides clear and enforceable provisions for such agreements.

¹³ The Portuguese Civil Code of 1867- Still remain applicable in Goa for family and matrimonial matters, offering a secular and uniform civil code.

The contractual approach embedded in the Portuguese Civil Code recognizes the autonomy of individuals to determine their financial arrangements within marriage. This stands in sharp contrast to the dominant view in Indian jurisprudence, which treats marriage, particularly under Hindu law, as a sacrament and often invalidates agreements that anticipate the possibility of separation or divorce. In Goa, however, such prenup-like arrangements are legally recognized and binding, providing clarity and legal certainty to both spouses in matters of property, inheritance, and maintenance. The enforceability of these agreements in Goa draws its legitimacy from Article 372 of the Indian Constitution,¹⁴ which allows colonial-era laws to continue unless specifically repealed or amended by the legislature. As a result, courts in Goa have consistently upheld prenuptial agreements in accordance with the Portuguese Civil Code, making them a viable and effective legal tool. This civil law tradition has allowed Goan couples to exercise greater agency in their marital and financial arrangements and has contributed to a more equitable resolution of disputes arising from marriage breakdowns.

The existence of this exception in Goa has broader implications for the Indian legal system. It demonstrates the practical benefits of treating marriage as a civil contract and allowing individuals to define the terms of their union in advance. It empowers both partners, especially women, to secure their financial rights and reduces the scope of uncertainty and conflict in the event of separation. The model promotes transparency, informed consent, and legal clarity, all of which are essential elements of modern family law. It also aligns with global practices in many jurisdictions where prenuptial agreements are standard and routinely enforced.

However, despite its evident advantages, the Goan model has not been adopted in other parts of the country. This is primarily due to the complex interplay between religion and law in India, where personal laws are deeply rooted in religious beliefs and customs. Many see the contractualization of marriage, particularly through prenuptial agreements, as incompatible with the sacred and indissoluble nature of marriage as conceived in many Indian traditions. Courts have often struck down prenuptial contracts as being opposed to public policy, reflecting the broader hesitation within the Indian legal system to embrace such mechanisms.

Furthermore, the lack of political consensus and societal readiness has made it difficult to introduce a uniform civil code or even recognize prenuptial agreements under existing secular

¹⁴ Article 372, Constitution of India- Permits constitution of pre-Constitution laws unless repealed or modified by Parliament.

legislation like the Special Marriage Act.

Thus, Goa remains the sole state in India where prenuptial agreements are not only recognized but actively supported by a comprehensive legal framework. This singular status raises important questions about the evolution of family law in India and whether other states might one day follow suit. Until such reforms take shape, Goa will continue to stand as a legal outlier and, in many ways, a beacon of modernity in the realm of matrimonial law.

One of the primary obstacles to the broader acceptance of prenuptial agreements in India is their potential conflict with public policy, especially when they include clauses that seek to waive rights that are otherwise protected by statute. Courts have consistently held that agreements which attempt to override legal entitlements. This issue becomes particularly problematic when prenuptial agreements contain terms that limit or exclude a spouse's claim to maintenance, which is a right guaranteed under provisions like Section 125 of the Criminal Procedure Code¹⁵ or the Hindu Adoption and Maintenance Act.¹⁶ Even when such clauses are mutually agreed upon, the judiciary often views them as invalid, as they undermine statutory protections designed to safeguard the interests of financially dependent spouses, most often women.

Such provisions are considered to violate public policy because they attempt to contract out of legal obligations that the legislature has deemed essential to ensure fairness and justice within marriage. As a result, while Goa allows couples to structure their property and financial rights through enforceable pre-marital agreements, the rest of India continues to approach such contracts with skepticism. The fundamental tension between personal autonomy in marriage and the protective purpose of family law remains a key reason prenuptial agreements have not been embraced more widely in the Indian legal system.

The need for legislative reforms

In light of these complexities, there is a growing need for legislative reform in India to reconsider the status of prenuptial agreements within its broader matrimonial framework. As Indian society evolves and family structures become more diverse and financially complex, the

¹⁵ Section 125, Criminal Procedure Code, 1973- Provides a legal right to maintenance for wives, children, and parents who are unable to maintain themselves.

¹⁶ Hindu Adoption and Maintenance Act, 1956- codifies Hindu wives to claim maintenance from husbands

absence of a clear legal framework governing prenuptial contracts creates uncertainty and often leads to prolonged litigation. Recognizing such agreements under a regulated legal framework would serve multiple constructive purposes and align the law with contemporary social and economic realities. One of the most compelling arguments for formal recognition is the need to protect individual assets and business interests that parties may have acquired independently before marriage. In an age where both partners often enter marriage with established careers, properties, and even business ventures, the absence of a mechanism to clearly define ownership and division of these assets creates unnecessary vulnerability and confusion.

Equally important is the role such agreements could play in promoting financial transparency between prospective spouses. Open discussions and legally recorded terms concerning assets, liabilities, and future financial responsibilities can help build trust and mutual understanding, which are essential foundations of any marriage. A clear and enforceable agreement also has the potential to reduce the volume and intensity of post-marital litigation, especially in cases of divorce where property disputes and maintenance claims often drag on for years. By providing a predetermined framework for the division of property and responsibilities, prenuptial agreements can significantly ease the emotional and financial toll of separation.

Moreover, such reform would reflect modern societal dynamics where women are increasingly financially independent and are not merely passive participants in marital arrangements. The existing legal assumption that women will necessarily require protection through maintenance overlooks the reality that many women today are active economic contributors and may wish to assert control over their own assets. A legal framework that allows for voluntary, informed, and equitable prenuptial agreements would thus better represent the agency of both partners. Finally, the recognition of such agreements would bring Indian family law closer to international best practices, where many jurisdictions—ranging from civil law countries in Europe to common law nations like the United States—recognize and enforce prenuptial contracts within clear statutory guidelines. These systems have shown that when appropriately regulated, prenuptial agreements can function as practical tools for marital planning without undermining the dignity or sanctity of marriage.

Conclusion and Recommendation

The absence of a clear legal framework for prenuptial agreements in India reflects a deeper reluctance within the system to view marriage as a partnership grounded in both emotional and

financial realities. While society has evolved, with individuals marrying later, building independent careers, and accumulating personal assets before marriage, the law continues to treat marital relationships through the lens of tradition alone. This disconnect has created a legal vacuum where couples are denied the right to enter into mutually agreed-upon contracts that could define their property rights, financial responsibilities, and obligations in a transparent and fair manner. The existing legal stance, rooted in the belief that such agreements offend public policy or anticipate divorce, fails to acknowledge the growing complexity of marital relationships and the need for autonomy, security, and clarity. Although Goa offers a rare exception through its civil code, it remains an isolated example, and the larger Indian legal framework continues to lag behind both contemporary societal expectations and international practices.

To bridge this gap, it is imperative that India introduce a legal framework that recognizes prenuptial agreements as valid and enforceable, provided they meet standards of fairness, informed consent, and legal scrutiny. This would not only empower individuals to make responsible financial decisions before marriage but also reduce litigation, support financial transparency, and reflect the modern reality in which marriage is as much a personal relationship as it is a socio-economic partnership. Legal reform in this area would mark a crucial step toward a more progressive, practical, and inclusive approach to matrimonial law in India.