

A Paper On The Suitability Of Prenuptial Agreements In India

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ABSTRACT:

The perception towards marriage in today's world is changing from what it used to be. Gone are the days of needless compromise to keep a marriage from falling. People today are much more worried about their own individual identity over the false image of having a stable relationship where the scenes behind the curtain show a very different picture.

With divorce statistics worldwide on an increasing trend, it is becoming important to address the parties' situation after the divorce. Prenuptial agreements worldwide are becoming more common, as newer generations get divorced at higher rates than their previous ones.

This study looks into the concept of prenuptial agreements all around the world on different continents. It also studies various religions and safeguards the parties to marriage after it ends, long before these concepts came into being. The study then moves into the Indian perspective and looks into the viability of having prenuptial agreements enforceable by Indian courts.

1. INTRODUCTION

Prenuptial agreements or 'prenups' are agreements that are made between two people who are getting married. The Cambridge dictionary describes 'prenuptial agreements as "an official document signed by two people before they get married that says what will happen to their possessions and/or children if they divorce."

As marriage in most cultures is looked upon as a unification of two, a prenup speaks of a situation where there is a bifurcation between such unification. It describes how after the end of marital property is distributed among them, whether and how much any alimony is to be provided for, etc.

Prenups are becoming more popular with every passing day. The reason for this is that the number of divorces is increasing over the years. It began in the 1970s; a worldwide trend of marriages ending up in divorces was found with countries such as the United States, the United Kingdom, South Korea, Singapore, and Mexico in the lead. Almost 5-8 percent of the marriages have ended into divorces¹. This has caused a realization that children's division of property and custody is a complex war to fight. Therefore, a contract or a simple agreement that settles such issues should be made if they are to be faced.

Although the term prenup is relatively new and has come into usage mainly since the 1980s, the concept is not very new. In the Jewish religion, a ketubah contract is signed by two witnesses while entering into a marriage that provides for the husband's legal obligation towards his wife and provides for her protection in the event of divorce or her death

husband². The earliest ketubahs can be traced back to 440 BCE and found in ancient Egyptian papyrus scriptures.

The concept of mahr in the Islamic religion is very similar to that of a ketubah contract and the modern-day prenup. Mahr is the payment or gift given by the husband to the wife while marrying her. It becomes the wife's property and could be used by the wife in whatever way she deems fit.³ The mahr, also known as dower, is an integral part of an Islamic marriage, and it is the right of the wife to receive it.

The practice of mahr differs from country to country. In Morocco, most of the Mehr is paid to the father of the wife, whereas in Iran, there is no transfer of wealth during the marriage but is looked upon as a security that is payable only in divorce. It acts as a negotiating mechanism for the custody of children or obtaining a divorce by the wife.⁴

Countries Where Prenups Are Legal

As divorce rates are increasing in most countries, many countries are now putting stress on making prenuptial agreements before any marriage is initiated. Some of the countries are creating a legal framework around marriage that provides emphasis on making prenups.

In South Africa, prenups are enforceable because marriages in South Africa subject both sides to a merger of the property, giving each side an entitlement of half of the entire property, including property that either party had before the marriage. Parties can choose to opt-out of a prenup by signing an antenuptial agreement.

In Thailand, a prenup is recognized and enforceable by the Commercial and Civil Code of Thailand. The prenup has to be understood by both parties thoroughly; it should not be against the rest of the country's law and requires two witnesses for it to be enforceable. The law also provides what can be considered as personal property and joint property. Thai law does not recognize that postnuptial agreements are recognizable.

In Ukraine, section 10 of the Family Code of Ukraine speaks of 'marriage contract' but does not explicitly mention prenups. It provides rights and duties of the spouses with respect to dealing with their property and parents. Various sections of the same code provide an in-depth understanding of the requirements of forming such a marriage contract. It is required to be made during application for registration of the marriage.

In the United Kingdom, prenups are a new occurrence. In the 2010 case, *Granatino v Radmacher*⁵, the court held that a couple was bound by the prenuptial agreement they got into before getting married. This changed the country's legal framework from not supporting prenups instead of affecting public policy to upholding prenups if they are entered into freely. Section 25 of the Matrimonial Causes Act, 1973 allows enforcement of prenups as long as it conforms to the three stages of the Radmacher test.

In Canada, prenups or marriage contracts are enforceable. Although the country is administered provincially, all provinces recognize the prenuptial agreements, but it is given different names in different provinces. For example, Ontario's Family Law Reform Act 1978 authorizes marriage contracts. The agreements have to be written and signed in the presence of witnesses. These laws do not allow the spouses to opt-out of making such an agreement. Canada's provincial laws allow only the court to set aside such an agreement if the parties do not understand nature or consequence; the degree of how much can be removed or

disregarded or set aside differs from province to province. For example, Nova Scotia's law for non-enforcement of a prenup whereas British Columbia's laws allow the court to disregard a provision of the agreement and re-divide the assets based on fairness.

In the United States, all of the fifty states and the district of Columbia recognize prenuptial agreements. The country recognizes prenups as well as post-nuptials. The Uniform Premarital Agreement Act was promulgated by the Uniform Law Commission and accepted by 28 states and DC. It has provided a uniform approach to the agreements. It requires the prenups to be written. It must be voluntary, complete disclosure during the execution. It should conform to the doctrine of unconscionability, and both parties should execute it under witnesses⁶. The United States of America has the most flexible laws and comprehensive legal frameworks regarding prenups and post-nuptials, providing many exceptions expanding to same-sex marriages, speaking about cross-country marriages, and marrying immigrants. It is the country with the maximum number of prenuptial agreements among millennial marriages.

In Australia, the prenups are known as 'binding financial agreements,' which was made enforceable by the Family Law Amendment Act 2000. The amendment provisions throw light on the precise details that allow such agreements to be enforceable and not render void. There have been cases faced by the judiciary that where the prenups have been upheld and disregarded, which shows no general emphasis or tendency to allow the conceptual idea of a prenup to pass. However, it is relative to the facts and situations of the case⁷.

In India, only the state of Goa has the concept of legally enforceable prenups as it follows the Portuguese Civil Code. However, it is not mandatory to sign a prenuptial agreement while getting married. A couple can choose not to go through with such a contract, and in such a situation, the marital property is divided into equal halves among the husband and the bride.

Religious Beliefs On Prenups

To understand the viewpoint of religion in a prenup context, it is first more critical to understand the spirit of a prenup. A prenup is an agreement that provides for, mainly, financial safeguards to the parties in a marriage if and in the event of a divorce and sometimes even death. As prenuptial agreements are new, it looks at both the husband as the wife as money-earners in the family, basically credits the fact that the wife also has the property that she could have purchased or earned.

In the point of religion, it is essential to understand that at the point in time when religious ideologies were made and spread, women were not bread-earners or even a part of the working class. The practice was that when a woman was born, she would be brought up and married off to a different family. To look at it from an utterly financial point of view, they have always been liabilities. Therefore, religious ideologies have provisions that safeguard the woman's interests by mandating the giving of gifts and other allowances by the husband, who was expected to be the bread-earner.

Islamic marriage itself is considered a contract, which outlines the bride and groom's rights and responsibilities. The contract is known as nikah-nama. The contract is required to speak on aspects such as the place of dwelling of the couple, whether the husband would take a second or not, whether that requires the first wife's consent or not. Another essential part of marriage in Islam is providing a 'mahr' to the bride before the marriage. This mahr is like a gift provided as the wife's financial security in case of death of the husband or if the couple,

later on, decide to separate. In case of a divorce, the wife might choose to give back the mahr or not. The mahr is given to either the bride or the father of the bride.

In Jewish marriages, a Ketuba contract is an integral part of the complete process of marriage. It consists of the husband's obligations to support his wife by providing food, clothing, and shelter, similar to that of the nikah-nama of the Muslims.

Christian marriages, on the contrary, are looked at as a union of two souls for a lifetime. Therefore, any prenuptial agreement does not find a place in the spirit of Christian marriage. Although the Bible does not explicitly mention anything about prenuptial agreements or marriage contracts in general, their explanation of marriage excludes the possibility of divorce altogether. A husband and wife are considered to be 'one flesh.' Therefore, plans and possibilities of breaking up the marriage do not like a supported idea in the Bible.

Therefore, marriage contracts existed since the time religion began to spread and prenups or even post-nuptials are also marriage contracts that have evolved through the times. Religion looked at the husband and wife with different complementary duties towards each other, whereas prenups expect the parties in a marriage to choose their duties towards each other.

Viability Of Prenups In India

In India, the majority of the population are followers of the Hindu religion. A minor part of the country follows the Islamic faith, and there are even smaller segments that follow Christianity, Sikhism, and some other religions. Since the viewpoints of marriage from the lens of Islam and Christianity have been addressed previously, this section of the study will delve into the Hindu religion only.

The Hindu view on marriage is a lot similar to that of Christianity. Neither of the faiths looks at marriage as a contract between the parties, but instead, they look at marriage as a holy union. Hinduism believes weddings to be a sacred ceremony that binds two souls together for a life-long journey. Marriages are celebrated mainly affair in this religion. It does not show the slightest tint of belief in the possibility that such marriage might end before the spouses' lives. The Gods in the religion are also believed to have spouses who emphasize the togetherness till-death-do-apart aspect.

Marriages in the Hindu faith have not evolved much with the times, as most of what happens in today's society has been happening since a long time ago. Therefore, newer aspects that have provided a different viewpoint to us about marriages have not influenced Hinduism in the context of their marriages.

A wide-known Hindu belief that pairs are made in heaven, but what is not addressed is that breakups and fallouts happen here on this planet. Divorces in the Hindu religion are dictated by the Hindu Marriage Act of 1955. Now that it has been established that not all marriages in the Hindu culture extend for a lifetime, it is essential to address the lives of the parties after the marriage.

Since marriage is not looked at as a contract, therefore prenups are not a practice in the Hindu faith, yet there are no provisions of any law that can directly prohibit the usage of prenuptial agreements. Such agreements are not enforceable in India, except Goa, but with increasing trends of marriages ending up in divorce, it looks like that they should be enforceable. As

much as divorces are a worrying affair in Hindu marriages, the added-on worry about economic segregation only acts detrimental to the whole affair.

In *Sunita Devendra Deshprabhu v. Sita Devi Deshprabhu*⁸, the Bombay High Court considered the prenuptial agreement while dividing assets between the erstwhile spouses. Just because they are not enforceable in India, per se, therefore it does not mean that they cannot be. In the example of the case, the court did not directly enforce the prenuptial agreement, but it took guidance from the agreement upholding the value of having one.

The Indian Contract Act, 1872 guides contracts in India. It states the requisites for forming a contract. Section 26 of the act states that agreements made in restraint of marriage are void. So if prenups do come into practice in India, it should conform to the provisions of the act, which mean, it should not be unfair to any side, should be made out of free will and consent, there should not be any misunderstanding as to the matter addressed in the agreement and should not be such that it acts in the detriment of the marriage itself.

2. CONCLUSION AND SUGGESTION

Marriages in India are governed mainly by the respective religions of the parties; sometimes, the Special Marriage Act comes into play if the marriage conflicts with the existing religious norms. There are some aspects of marriage in our country that have evolved over the years for good.

The introduction of prenuptial agreements in India should be the next step in the evolution of marriage ceremonies. On the one hand, the second most followed religion in the country, Islam, already has the concept embedded in the religious tenets; on the other hand, the most followed religion, Hinduism, should also allow the usage of prenups.

As much as marriages should be a union for a lifetime but if there are differences that cannot be addressable, then the methods of providing peace and happiness to both parties should be sought out. The mere existence of a prenuptial agreement does not mean that a marriage will come to an end; it simply means that in the event of such an occurrence, there will be less confusion, less heated arguments, and less ambiguity in the process.

Every human on the planet seeks financial stability, or it should be. Prenuptial agreements help make sure that there is financial stability on the part of both parties after marriage.

It is also important to note that prenups are not just a good and helpful thing. A lot can be said about how it focuses on ending a marriage even before it just begins. To see it from that point of view, it is a lot like the concept of insurance. Most people get insurance for their health, cars, and other property, which provides a financial safeguard from any mishap. However, it does not necessarily mean that such an event will most definitely occur.

Prenups are becoming more and more common in many countries over the world. In the previous sections of this study, it is shown how the spirit of the agreements were upheld by various religions itself in their way as per the needs and requirements of the earlier times. The world has reached a time where it strives to provide individual identity to every person irrespective of who they are, and prenuptial agreements help in the same effect.

3. WORKS CITED

- [1]. Esteban Ortiz-Ospina and Max Roser (2020). "Marriages and Divorces." Published online at OurWorldInData.org. Retrieved from: '<https://ourworldindata.org/marriages-and-divorces>' [Online Resource]
- [2]. Solutions, E., 2016. What Is A Ketubah And Where Did It Come From?. Published online at ketubah.com. Retrieved from '<https://ketubah.com/blog/what-is-a-ketubah-and-where-did-it-come-from>' [Online Resource]
- [3]. Esposito, J., 2020. Mahr. Published online at Oxfordislamicstudies.com. Retrieved from: '<http://www.oxfordislamicstudies.com/article/opr/t125/e1390>' [Online Resource]
- [4]. Encyclopedia.com 2020. Mahr. Published online at encyclopedia.Com. Retrieved from: '<https://www.encyclopedia.com/religion/encyclopedias-almanacs-transcripts-and-maps/mahr>' [Online Resource]
- [5]. Radmacher v Granatino 2010 UKSC 42
- [6]. Web.archive.org 2020. Wayback Machine. Published online at web.archive.org. Retrieved from: 'https://web.archive.org/web/20170828020040/https://www.iafl.com/cms_media/files/prenuptial_agreements_in_the_us.pdf' [Online Resource]
- [7]. Morley, J., 2020. PRENUPTIAL AGREEMENTS IN AUSTRALIA | The Law Office Of Jeremy D. Morley. Published online at International-divorce.com. Retrieved from: '<https://www.international-divorce.com/prenuptial-agreements-in-australia>' [Online Resource]
- [8]. Sunita Devendra Deshprabhu v. Sita Devi Deshprabhu, 2019 SCC OnLine Bom 301