

QUEST FOR PRENUPTIAL AGREEMENT IN INSTITUTION OF MARRIAGE: A SOCIO-LEGAL APPROACH

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Abstract

We are living in a global village where compatibility dictates the stability of a marriage, pushing matters of law and custom to the backseat. As the demands of matrimonial alliance change, so must the lawyers, who must forge a new path through confusing personal laws and conflicting jurisdictions. This paper deals with the concept of “Prenuptial Agreements” and evaluates the desirability of formalising expected rights and duties of the bride and groom by putting them on paper, and also elaborates on the necessary contours of a well-drafted prenuptial agreement. Today’s prenuptial agreements are similar to the customary practice in India, where families of the bride and groom delineate the composition and division of resources, rights, liabilities and responsibilities before, or at the time of, the union. However, modern-day prenuptial agreements are still viewed as “alien” and indicative of the eventual failure of marriage, so societal resistance remains.

I Introduction

IN THE general course of things in India, the families of the bride and groom approach each other with a proposal of marriage. Once the compatibility of the two families is established, other related matters of the proposed marriage are discussed and deliberated upon amongst the relatives, and only then is the marriage arranged. This means that in the entire process of the marriage, there is an element of arrangement, mostly oral in form. This arrangement exists not between the parties to the marriage, but between their families. This process, if accepted as a social norm and entered upon in the formal contractual manner by the parties to marriage, is to be called “Prenuptial Agreement”. Thus, the concept of prenuptial agreements has already existed in our society for a long time but never been formalised in the real sense.

A prenuptial agreement, ante-nuptial agreement, or premarital agreement, commonly abbreviated as “prenup” or “prenupt”, in its plain sense, refers to an agreement made between two parties, intending to marry, before they enter into the sacramental or contractual relationship of marriage, in order to provide for all possible contingencies and to take care of all foreseeable problems that may arise from such marital knot, signed voluntarily, without any duress, coercion or undue influence. It is especially important for people planning to marry, residing in different jurisdictions - domestically or internationally. It is like a contract entered into between the bride and groom to-be, prior to their marriage. Prenuptial agreements mainly provide for issues relating to

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disclosures required to be made to one-another, like each party's educational qualifications, health status, caste, *gotra*, surname, customs applicable, debts, assets, medical condition, property, financial liabilities, marital status, consequences, divorce, parental responsibilities including custody of children, protection of children from any previous marriage, reverse parental responsibility, *etc.* It is basically an effective instrument to take care of both financial and personal liabilities of persons in case the marriage fails, thereby protecting the interests of both parties equally.

Contrary to popular belief, prenuptial agreements have been used for thousands of years. In the United States, during the 19th century, before the Married Women's Property Act of 1848, the agreements were necessary for women. Until this practice became law, everything a woman owned or inherited was transferred to her husband. If he died or divorced her, she could lose everything. While the Indian legal system does not identify the concept of prenuptial agreement in its formal sense, many countries, including Canada, France, Italy, and Germany, have matrimonial regimes, in addition to, or some cases, in lieu of prenuptial agreements.

Prenuptial agreements are agreements entered into by prospective spouses before a proposed marriage is to be solemnised. These agreements state the rights and liabilities of spouses especially in financial matters like the listing both parties' properties, procedure of divorce, and conditions relating to adoption of a child or maintenance with the consent of both parties. The driving force behind prenuptial agreements is the lack of certainty for eventualities. 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, lays out divorce procedure, etc.

This type of agreements is very progressive in approach, ensuring that the parties to a proposed marriage can envision a redressal for all foreseeable disputes before they even enter into a marriage contract. Prenuptial agreements are not just for rich people. Any average person can enter into it as it is a precautionary step for financial security against future uncertain events.¹ As society is changing day by day, and spouses are worried about their career and individuality after marriage, a prenuptial agreement is the best option available for multifarious reasons. *Firstly*, it is the most economical solution, considering the costs of divorce or suits relating to maintenance, adoption *etc.* through the court. *Secondly*, parties are free to include conditions which are suitable to them with mutual consent. *Thirdly*, the procedure is more relaxed than going through court. And *fourthly*, it keeps a check on misrepresentations made by either spouse and

1 Vijender Kumar, "Matrimonial Property Law in India: Need of The Hour", 57(4) *JILI* 521 (2015).

reduces the possibilities of fraud; and hence, parties can be protected from such bitter experiences.² A properly drafted prenuptial agreement has a binding effect over both parties and is legally enforceable.³

II Prenuptial Agreement Pros and Cons

The major advantage of having a prenuptial agreement is that it will settle property issues among disputing couples, especially after they split by a formal decree of divorce. Most of the entitlements under the divorce law in India are governed by the personal laws of the parties *viz.*, the Hindu Marriage Act, 1955; the Muslim personal law besides the Dissolution of Muslim Marriage Act, 1939; the Indian Christian Marriage Act, 1872, the Divorce Act, 1869 (2001); and the Parsi Marriage and Divorce Act, 1939. Additionally, the Special Marriage Act, 1954 governs inter-religious marriages and divorces. Irrespective of the applicable law, a prenuptial agreement can thus be seen as an effective instrument to ensure an equitable division of matrimonial assets on divorce. There are numerous other benefits of a prenuptial agreement such as: it can protect a person from his other partner's debts; prevent one's business, profession/estate from getting divided; ensure spousal support in terms of maintenance or alimony; guarantee remarriage rights and take care of child support with parental responsibility and custody issues.⁴

Prenuptial agreements also help to minimize litigation, resolve child custody issues, determine the rights of cross-border couples, tackle maintenance issues, provide for proper and fair division of properties, *etc.* Further, measures such as these can help check false prosecutions by unscrupulous spouses who might otherwise take advantage of provisions meant for to protect vulnerable women in marriage. This is especially useful in minimising the unfortunate side effects of women misusing Section 498A of the Indian Penal Code, 1860 or the provisions of the Protection of Women from Domestic Violence Act, 2005 for blackmail and extortion of money. Thus, in case of men, a prenuptial agreement could potentially protect them from exorbitant divorce settlements.⁵ For individual earners, it makes sure that nothing, not even a joint account, can become a point of dispute in case of a divorce.⁶ These days, some couples are even pre-determining matters like custody of a child in order to ease the prolonged

2 *Id.* at 522.

3 *Ibid.*

4 Legal Service India, Pre-Nuptial Agreements, *available at:* <http://www.legalserviceindia.com/article/l284-Pre-nuptial-agreements.html> (last visited on December 18, 2017).

5 Prenuptial Agreement, Financial Discussion before Marriage, Money and Divorce, *available at:* <https://www.bemoneyaware.com/blog/prenuptial-agreement-financial-discussion-before-marriage-money-and-divorce/> (last visited on December 18, 2017).

6 *Ibid.*

and painful procedure of taking recourse to a court of law and ensure an amicable settlement.⁷ However, it is needless to say that people do not look forward to agreeing to enter into a prenuptial agreement. One cannot imagine divorce in India because marriage is considered as a sacrament. This is despite the presence of divorce provisions in section 13 of the Hindu Marriage Act, 1955 for Hindus and corresponding provisions in other laws on divorce.⁸ To a couple that is about to share a life together, the possibility of death or divorce is inconceivable. Moreover, a prenuptial agreement, according to many, reduces the sanctity of the institution of marriage, making it sound more like a business proposition.

In India especially, the institution of marriage has very sacred connotations. Since a sizable portion of the population is illiterate and inclined towards traditional beliefs, it would find even the proposition of a prenuptial agreement absurd. The idea, by itself, would likely be rejected. Moreover, a party's suggestion of entering into a prenuptial agreement is, according to most people, indicative of the fact that there is an absence of mutual trust which is the foundation of any relationship. Thus, these views of prenuptial agreements act as a strong deterrent for parties wishing to enter into one.

Eventually, the result is that, in the cases of divorce or death, the distribution of matrimonial properties is left to the law of the land, and ultimately, the court. The justice delivery system undoubtedly does its utmost to distribute the parties' properties and assets in the best possible way. However, it cannot be denied that the process is not only tedious, but also very time consuming and incurs a huge cost. To avoid this condition, it is suggested that the parties to a marriage must emphasise on practicality themselves and must understand the benefits of a prenuptial agreement. They should accept the fact that it is not indicative of a lack of trust or love, but merely an instrument of precaution, to avoid inconvenience to both parties if something distressing happens.

III Religion and Prenuptial Agreement

Catholicism and Canon Law

Prenuptial agreements are a matter of civil law, so Catholic Canon Law does not rule them out in principle.⁹ In practice, prenuptials may run afoul of the Church law in a number of ways.¹⁰ For example, they cannot subject a marriage to a condition concerning

7 Akansha Ghose and Pallavi Agarwal, "Prenuptial Agreement: A Necessity of Modern Era" 2(5) *International Journal of Research and Analysis* 21 (2014).

8 The Indian Divorce Act, 1869; The Parsi Marriage and Divorce Act, 1935, S. 32; The Dissolution of Muslim Marriage Act, 1939, S. 2; and The Special Marriage Act, 1954, S. 27.

9 Dana Moore Law 'Prenuptial Agreement' available at: <http://danamoorelaw.com/prenuptial-agreement/> (last visited on December 18, 2017).

10 Bauer Family Law 'Prenuptial Agreement' available at: <http://www.bauerfamilylaw.com/prenuptial-agreement.html> (last visited on December 19, 2017).

the future (such as an agreement regarding the division of assets in case of divorce). The Code of Canon Law, 1983 provides that “a marriage subject to a condition about the future cannot be contracted validly”.¹¹ [Emphasis added.]

In letter and spirit, a commentary on Canon Law, explains that “condition” may be defined as “a stipulation by which an agreement is made contingent upon the verification or fulfilment of some circumstance or event that is not yet certain”. Further, it goes on to state that “any condition concerning the future attached to matrimonial consent renders marriage invalid.”

Judaism

In Judaism, the *Ketubah*, a prenuptial contract, has long been established as an integral part of Jewish marriages, and is even signed and read out loud at the marriage ceremony.¹² It contains the husband’s requirement to support his wife by providing her with food, clothing and marital relations, as well as providing for the wife’s support in the case of divorce or his death. However, a woman is free to leave if her husband does not provide for her.

In 2004, the High Court of South Africa upheld a *cherem* against a Johannesburg businessman because he refused to pay his former wife alimony as ordered by The Johannesburg Beth Din.¹³ A movement supporting an additional prenuptial agreement has emerged in some modern orthodox circles.¹⁴ This has come in response to a large number of cases in which the husband refuses to grant a religious divorce.

Islam

In Islam, the prenuptial contract (Arabic *Katb el-Kitab*, Urdu *Nikab-Nama*), has long been established as an integral part of the Islamic marriage, and is signed at the marriage ceremony. It outlines the rights and responsibilities of the groom and bride or other parties involved in marriage proceedings.¹⁵ It must necessarily be a public declaration and cannot be secretive.

11 Can. 1102 §1, available at: http://www.vatican.va/archive/ENG1104/_P3Z.HTM (last visited on December 20, 2017).

12 The Jewish Marriage Contract (*Ketubah*), available at: https://www.chabad.org/library/article_cdo/aid/465168/jewish/The-Jewish-Marriage-Contract-Ketubah.htm (last visited on December 18, 2017).

13 The Johannesburg Beth Din in a Sentence, available at: <https://eng.ichacha.net/zaoju/the%20johannesburg%20beth%20din.html> (last visited on December 18, 2017).

14 Prenuptial Agreement, available at: https://www6.dict.cc/wp_examples.php?lp_id=1&lang=en&s=prenuptial%20agreement (last visited on November 18, 2018).

15 *Ibid.*

The best example of recent developments in the matter of prenuptial agreements comes from Malaysia. Its approach to personal laws is less fundamentalist than other Muslim-majority countries, which gives Malaysia a unique advantage to amend its laws in accordance with societal changes. Under its civil law of marriage, prenuptial agreements may receive legal validity due to inherent contractual underpinnings that all parties are given the freedom or right to enter into contract so long as they comply with the legal requirements of the Contract Act, 1950 of Malaysia, particularly section 10 (what agreements are contracts) and section 11 (who are competent to contract).

Under the *Syariah* perspective, there are unsettled on-going debates within the academic and legal practice circles whether the *Syariah* court will actually give effect to prenuptial agreement entered into by the Muslim parties.¹⁶ Although there is no consensus, there is a general perception that the *Syariah* laws may permit such a prenuptial agreement if it complies with the conditions (*Syarat*) and ingredients under “*Taklik*” agreement. The standard *Taklik* agreement or contract is just a standard form which may be varied by the parties. In such situations, the *Syariah* court may or may not endorse such additional *Taklik* agreements. As a general rule, a prenuptial agreement is a unique creation which may be adopted or rendered permissible under *Syariah* law because the foundation of *Syariah* contract law shares similarities with the civil contract law so long as it is not something which is prohibited by the *Syariah* laws.¹⁷

Both sections 2 and 22 of the Islamic Family Law Act, 1984 (Federal Territories) are guiding general provisions which are amenable to prenuptial agreement. Further, prenuptial agreement has neither been tested in the civil court nor the *Syariah* court in Malaysia. Thus, any attempt, by the SIS or the parties themselves, to pre-empt the legality of prenuptial agreements under the *Syariah* laws would contradict the *Syariah* “sub-judice” rule and be deemed prejudicial under such circumstances. In summary, the validity of any *Taklik* agreement or prenuptial agreement must be endorsed by the *Syariah* court in the respective States. In any event, there is no consensus that a prenuptial agreement is wholly un-Islamic.¹⁸

16 The Practice of Conditional Divorce, *available at*: <http://almanawee.blogspot.com/2012/03/practice-of-conditional-divorce.html> (last visited on November 27, 2018).

17 Pre-Nups Protect Muslim Women, *available at*: http://www.malaysianbar.org.my/legal/general_news/pre_nups_protect_muslim_women.html (last visited on November 27, 2018).

18 Options for an Islamic Prenuptial Agreement, *available at*: <https://www.soundvision.com/article/options-for-an-islamic-prenuptial-agreement> (last visited on December 19, 2017).

IV Comparative Study of Prenuptial Agreements

International Law

In the sphere of international law, it is The Hague Convention on the Law Applicable to Matrimonial Property Regimes, 1978 which explicitly authorises prenuptial agreements. The Convention has five contracting states, which means that it currently only serves as a guiding light to other states. Its provisions determine the law applicable to matrimonial property disputes and provide that, in the absence of a concluded marriage contract, the internal law of the state in which both parties habitually reside shall be deemed to be the applicable law in the event of a dispute between the parties. It enforces the validity of prenuptial agreements by stating that

“the marriage contract is valid as to form if it complies either with the internal law applicable to the matrimonial property regime, or with the internal law of the place where it was made. In any event, the marriage contract shall be in writing, dated and signed by both spouses”¹⁹.

Further, The Hague Convention provides that

“the designation of the applicable law by express stipulation shall comply with the form prescribed for marriage contracts, either by the internal law designated by the spouses, or by the internal law of the place where it is made. In any event, the designation shall be in writing, dated and signed by both spouses”²⁰.

India

In India prenuptial agreements were not even thought of until recently, as marriage has been an affair between two families, wherein two heterosexuals of marriageable age are given in intended marriage by their respective parents. Further, the said marriage is recognised by the society on its due celebration and it has been provided protection under the personal law of the parties. However, in most of the other countries in the world, a valid prenuptial agreement is legal and binding not only when a couple enters into a matrimonial relationship but also whenever it wishes to come out of it. Therefore, the Indian legal system does not recognise premarital agreement as a matter of law.

A quick survey of some of Mumbai’s top divorce lawyers revealed that roughly ten per cent of marriages, mainly in the affluent socio-economic group, are opting for prenuptial agreements. A mere few years ago, a prenuptial agreement was almost unheard of in

19 The Hague Convention on ‘The Law Applicable to Matrimonial Property Regimes’ 1978, Art. 12.

20 *Id.*, Art. 13.

India. One could attribute this steep rise to the growing number of divorces in the country.²¹ What makes it unique in the country, however, is the fact that couples forego their rights to the traditional Hindu, Muslim, Christian and Parsi personal laws in order to make sure their individual finances are safe.²²

Some legal experts caution that agreements of this kind will have little bearing in an Indian court. Any agreement opposed to public policy is not tenable. A prenuptial agreement cannot be executed in a court of law.²³ It is the federal law in the West which provides for such an agreement, as in the Hindu Marriage Act, 1955; the Special Marriage Act, 1954; the Parsi Marriage and Divorce Act, 1939; and the Christian Marriage Act, 1872 do not sanction this kind of agreement. It can at best be considered as a memorandum of understanding between parties. Similarly, courts in India have not recognised the validity of prenuptial agreements. The Indian personal laws define “marriage” and its requirements whereas the Indian Contract Act defines “agreement” and provides its essentials but agreements such as “prenuptial agreements” do not fall into the legal jacket of “marriage”. So, they are not deemed to be valid. However, social scientists and economists think these agreements are valid in law.

In India, prenuptial agreements are not governed by the laws relating to marriage, but by the existing contract law.²⁴ Under Section 10 of the Indian Contract Act, 1872, prenuptial agreements have as much sanctity as any other contract, oral or written; just because litigation has not begun in this area does not mean that it has to be treated differently, and that it cannot be enforced. The courts do take cognizance of a prenuptial agreement if both parties have mutually agreed, are competent to contract, and the prenuptial agreement clearly states the fair division of property, personal possessions and financial assets of the parties.

The registration of marriage is provided under section 8 of the Hindu Marriage Act, 1955. It has been held by the Supreme Court in *Seema v. Ashwani Kumar*²⁵ that the

21 ‘Prenuptial Agreements: Building a Safety Net Around Assets’ *LiveMint*, available at: <http://www.livemint.com/Money/ngLavHhlUeaCqDN2xoqa2K/Prenuptial-agreements-building-a-safety-net-around-assets.html> (last visited on December 18, 2017).

22 Akansha Ghose and Pallavi Agarwal, “Prenuptial Agreement: A Necessity of Modern Era”, Further see *supra* note 9.

23 ‘Instances of Prenuptial Agreements on the Rise’ *The Hindu*, Apr. 29, 2011, available at: <http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/Instances-of-pre-nuptial-agreement-on-the-rise/article14864714.ece> (last visited on December 18, 2017).

24 ‘Legally India, I Do, You Do... But Just Sign Here’, available at: <https://www.legallyindia.com/views/entry/i-do-you-dobut-just-sign-here> (last visited on December 18, 2017).

25 AIR 2006 SC 1158: (2006) 2 SCC 578.

registration of marriage must be made compulsory as it would serve as an evidence of the marriage and would help the women in seeking matrimonial remedy. However, in spite of some of states passing laws in this regard, the registration of marriage remains futile. To achieve the desired result of registration of marriage, an alternative approach could be prenuptial agreement of marriage.²⁶

United States of America

Prenuptial agreements, sometimes also referred to as “ante-nuptial agreements” or “premarital agreements” are agreements between parties contemplating marriage that alter or confirm the legal rights and obligations that would otherwise arise under the laws governing marriages that end either through divorce or death.²⁷ At one time in the American legal history, courts in the United States did not enforce prenuptial agreements that addressed what would happen upon divorce because courts viewed them as agreements that contemplated divorce, and hence encouraged divorce.²⁸ In an era when most states had fault based divorce, divorce was not allowed simply by mutual consent; thus, agreements that contemplated divorce were also seen as efforts to generate false evidence of faulty grounds, and therefore forbidden, but the agreements could address what was to happen upon death.²⁹

The United States, as a general matter, highly values contractual freedom, so much so that the concept of the right to contract and to have those rights enforced is enshrined in the United States Constitution, 1789. A unique set of procedural requirements, tests for substantive fairness both at the time of execution and at the time of enforcement, makes these contracts unlike any other standard commercial contract.

Unlike other countries that prohibit or refuse to enforce prenuptial contracts, most courts and legislative bodies in the United States now take the general position that prenuptial agreements are enforceable if they meet certain formal procedural requirements and are otherwise valid contracts under general contract principles.³⁰ However, factors that will also be considered are the length of the marriage, the foreseeability of various developments in the marriage, the existence of children, and

26 Vijender Kumar, “Matrimonial Property Law in India: Need of The Hour” 57(4) *JILI* 521 (2015).

27 Gary A. Debele and Susan C. Rhode ‘*Prenuptial Agreements in the United States*’ Available at: https://www.iafl.com/cms_media/files/prenuptial_agreements_in_the_us.pdf (last visited on January 11, 2018).

28 *Brooks v. Brooks*, 733 P.2d 1044, 1049 (Alaska 1987). See also: Gary A. Debele and Susan C. Rhode, Prenuptial Agreements in the United States, *supra* note 35.

29 *Ibid.*

30 *Ibid.*

the general substantive fairness of the agreement, both at the time the contract is executed and when it is to be enforced. Each state's courts and legislature will promulgate these factors in their own unique ways.

Married American citizens increasingly are living in more than one country or moving from one country to another, and are marrying persons from other countries. Not only do American attorneys now have to advise clients on how their foreign-drafted prenuptial agreement will be treated in the United States, but often the foreign practitioner will need to consider how to enforce an American prenuptial agreement in a foreign country or how a foreign prenuptial agreement will be construed in the United States. The law surrounding prenuptial agreements in the United States is complex and changing rapidly as a result of demographic and cultural trends.³¹ The problem regarding prenuptial agreements is that there are fifty states within the United States, and each state has its own laws and practices regarding the laws of prenuptial agreements. Given that most of the states have enacted statutes addressing prenuptial agreements, there is also the complex interplay between the common law and statutory law. In addition, states within the United States have their own property regimes, some of which are community property states, while others are common law property states. This affects the presumptions regarding marital and non-marital property and the division of such property on the termination of a marital relationship. Even the Constitution of the United States is implicated in the laws of prenuptial agreements, especially regarding the right of persons to enter into contracts, notions of equal protection and enforcement, and notions of procedural and substantive due process.

Today in the United States these agreements are much more common. One of the significant demographic trends driving this increase in prenuptial agreements is that at present, people from a variety of age groups and economic backgrounds are seeking such agreements. Parties to these contracts may be relatively young and about to enter their first marriage, but one or both may be positioned to inherit wealth or a family business in the near future and family members may wish to keep the assets in the family. Either one or both of the parties may have been married before, and might have pre-existing children they want to provide for. Alternatively, their divorce was such a horrific experience that they want to resolve property division and spousal maintenance before a divorce occurs. All these trends are affected by current demographics.³²

31 Heidieh Nasheri, "Prenuptial Agreements in the United States: A Need for Closer Control?" 12(3) *International Journal of Law, Policy and the Family* 307 (1998).

32 *Ibid.*

Although it is a general rule in the United States that prenuptial agreements can neither parental duty to support children nor bind the court to custody determinations, such agreements can be used to expand children's rights by establishing more generous or special benefits or a higher standard of living. While all fifty states recognize prenuptial agreements in one form or another, it is important to know in which state the agreement was written and where it will likely be enforced. Each of the states has its own law on the scope and enforcement of prenuptial agreements.

There is a Uniform Prenuptial Agreement Act, 1983, which governs prenuptial agreements across the US. While approximately 27 states have adopted the Act, each of these states has included its own modifications. It has not been adopted by states such as Mississippi, Missouri, South Carolina, and West Virginia *etc.* The UPAA's standards lean towards the enforcement of premarital agreements; the only requirements for enforcement are that the agreement must be in writing and that it must be entered into voluntarily.³³ A party challenging an agreement on the basis of its fairness can prevail only if he or she shows both that the agreement was unconscionable when entered into, and that the party did not have adequate notice of the other party's financial circumstances.³⁴ The UPAA also places some limits on the enforceability of provisions waiving the right to spousal support.³⁵ However, the remaining states have adopted their own statutes or apply common law, provided that the following criteria are met.

(i) Prenuptial Agreements must be in Writing

While there have been some exceptions to this requirement using contract principles, the Uniform Prenuptial Agreement Act requires no other formalities beyond the agreement being in writing and signed by both parties;

(ii) Opportunity to Consult with Legal Counsel

The absence of counsel does not render a prenuptial agreement unenforceable, so long as the individual had an opportunity to consult with independent legal counsel. The absence of counsel may be one factor in the future viability of the agreement but generally this aspect alone will not be dispositive;

(iii) Some Degree of Financial Knowledge or the Opportunity to Obtain the Knowledge

The level of disclosure varies from state to state. Some states impose an affirmative duty to disclose. A material, fraudulent nondisclosure or failure to disclose a material

33 Brian H. Bix, "Premarital Agreements in the Ali Principles of Family Dissolution" 8 *Duke Journal of Gender Law & Policy* 234 (2001).

34 *Ibid.*

35 *Ibid.*

fact may void all or part of the agreement. If, however, the nondisclosure did not prejudice a party, the agreement still may be enforced;

(iv) The Agreement must be Signed before the Marriage

In many states there is a requirement that the agreement be signed at least 24 hours prior to, or the day before, the wedding. The closer to the marriage the agreement is signed, the more likely it is to be challenged;

(v) For the Agreement to be Enforceable there must be a Marriage Subsequent to Execution of the Agreement

The Uniform Prenuptial Agreement Act provides for the enforcement of a prenuptial agreement even where the marriage is void, but only in instances where the parties have been married for a long time and one of the parties has relied on the agreement during the marriage;

(vi) Adherence to Public Policy

Attempts to regulate certain areas of marriage may be unenforceable because they are against public policy. For example, any limit on child support may be void as against public policy and affecting the rights of individuals who were not parties to the agreement. Provisions regarding child custody are also typically not enforceable;

(vii) Payments and Waivers

Some states do not permit prenuptial agreements to cover the payment or waiver of spousal support. Other states do not permit a waiver of attorney's fee; and

(viii) The Element of Fairness

What degree of fairness is required and when the fairness will be tested varies from jurisdiction to jurisdiction? Some jurisdictions use an either-or test; if the agreement is substantively unfair but there has been financial disclosure, then it is enforced, or if the agreement is substantively fair but there was no disclosure, it will still be enforced.

The Uniform Prenuptial Agreement Act favours enforceability, so the agreement must be unconscionable when executed. The only exception to this sweeping rule is in case of a waiver or limit on spousal support that leaves a party eligible for public welfare. In that case only, the court can award sufficient support to avoid the payment of welfare. Some states will set aside an agreement if it is unconscionable at the time of execution no matter if there has been full disclosure. Prenuptial agreements frequently cover the parties' rights and obligations not only upon divorce but also upon death. Generally, enforcement of prenuptial agreements upon death is favored more so than upon divorce. When drafting, the parties must keep in mind some of the future challenges that may be made to the agreement and draft to avoid or at least address those challenges. For example, what may be fair consideration after five years may not be fair after

twenty-five years, which means the couples must plan for longevity. The financial disclosure should be attached to the agreement and should be as complete as possible. The agreement should contain a method for alteration of its terms. Typically, the changes must be in writing and meet the technical requirements of the original execution.

The burden of proof in challenging the agreement varies by jurisdiction. Typically, the proponent of the agreement has the burden of proof although this may be changed by statute. An issue may arise as to which state's law will apply. Under the American law of conflicts, the general rule is that the validity and the enforceability of the contract are determined by the law of the state where the contract was entered into or the state whose laws the agreement specified will apply in a choice of law provision.³⁶ This doctrine will be equally applicable to prenuptial agreements. In situations where the parties did not express an intention as to the law to be applied, the majority approach, which tracks with the restatement, is that the laws and policies of the state having the most significant relationship to the transaction of the parties should be applied.³⁷

Certainly, another issue affecting the international enforcement and interpretation of prenuptial agreements can be implicated if a foreign country has passed on the validity and interpretation of such an agreement and then a court determination is sought as to enforcement in the United States. The constitution of the United States and most state constitutions have a full faith and credit clause that requires that the courts of each state honor other state's public acts, records, and judicial proceedings.³⁸

Since the full faith and credit clause would not apply to foreign countries' judgments and judicial determinations, one is left with the doctrine of comity.³⁹ Comity is the principle under which a court in one country either declines to exercise jurisdiction under certain circumstances in deference to the laws and interests of another foreign country, or agrees to apply another country's judicial or other legal decisions because of confidence that the procedures used to arrive at the decisions or action were fair and appropriate given the circumstances.⁴⁰

36 Robert C. Lawrence, III and Elisa Shevlin Rizzo, "Basic Conflict of Laws Principles" in Jeffrey A. Schoenblum (ed.), *A Guide to International Estate Planning* (American Bar Association, 2000).

37 *Ibid.*

38 Thomas J. O'Neil, "Full Faith and Credit Clause of the Federal Constitution" 5(4) *Notre Dame Law Review* 199 (1930).

39 William S. Dodge, "International Comity in American Law" 115(8) *Columbia Law Review* 2071 (2015).

40 John Kuhn Bleimeir, "The Doctrine of Comity in Private International Law" 24(4) *Catholic Lawyer* 327 (1979).

Premarital agreements now appear to be enforceable, at least in some circumstances, in all American jurisdictions.⁴¹ Roughly half of the jurisdictions have passed some version of the Uniform Premarital Agreement Act.⁴² There are several ways that a prenuptial agreement can be attacked in court. These include lack of voluntariness, unconscionability, and a failure to disclose assets.⁴³

United Kingdom

The Matrimonial Causes Act, 1973 does not make any express reference to any agreement or private ordering between the parties or how the court might or should take into account the distribution of assets on marital breakdown. However, the law relating to pre-nuptial agreements has been under both legislative and judicial review, with a generally positive regard for their potential enforceability, subject to a number of required safeguards.⁴⁴ In 1998, the Lord Chancellor, Lord Irving of Lairg, confirmed that the government was considering whether pre-nuptial agreements should, where they exist, be legally binding.⁴⁵ He stated that to include the drawing up of a pre-nuptial agreement as an aspect of marriage preparation would “give couples a greater degree of certainty about the ownership of property if a marriage should end in divorce; and could, therefore, help to remove some of the grounds for conflict, as well as contribute to our objectives of certainty, clarity and the reduction of costs.”⁴⁶

This was followed in 1999 by the publication of the Home Office Green Paper, *Supporting Families: A Consultation Document*.⁴⁷ One aspect of the consultation document considered the issue of agreements concerning marital property and concluded that to permit prenuptial agreements would give people more choice and allow them to take more responsibility for ordering their own lives. Rather than weakening the union, it was suggested that such an agreement would help the couple

41 *Supra* note 42.

42 *Ibid.*

43 James A. Hennenhofer Family Law, Prenuptial Agreements, *available at*: <http://www.jahfamilylaw.com/services/prenuptial-agreements> (last visited on December 18, 2017).

44 Report of the Study Group on Pre-Nuptial Agreements presented to the Tánaiste and Minister for Justice, Equality and Law Reform, Mr. Michael McDowell, T.D., April 2007, Chapter 4, Legal Status of Pre-Nuptial Agreements in Other Jurisdictions, p. 28.

45 *Ibid.*

46 *Ibid.*

47 Home Office Green Paper, *Supporting Families: A Consultation Document* (1998), *available at*: <https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/14200489b50c911e498db8b09b4f043e0.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=35ce4718-ce0a-47c6-88fc-9a3bc95a7dc2&contextData=%28sc.Default%29&comp=pluk> (last visited on January 10, 2018).

to build a solid foundation for their marriage by encouraging them to look at the financial issues that were likely to arise once they were married. Another advantage identified was that such an agreement could provide for the children of a first marriage who might otherwise be overlooked at the time of the second marriage.⁴⁸ In the event that prenuptial agreements should be recognised as lawful, the Green Paper set out six scenarios, each of which would operate to negate the potentially binding effect of a prenuptial agreement that where there is a child of the family, whether or not that child was alive or a child of the family at the time; when the agreement was made; where under the general law of contract the agreement is unenforceable, including if the contract attempted to lay an obligation on a third party who had not agreed in advance; where one or both of the couple did not receive independent legal advice before entering into the agreement; where the court considers the enforcement of the agreement would cause significant injustice (to one or both of the couple or a child of the marriage); where one or both of the couple have failed to give full disclosure of assets and property before the agreement was made; and where the agreement is made fewer than 21 days prior to the marriage.⁴⁹

By including the safeguards set out above it appears that the court would retain significant power to ignore or alter the terms of the agreement in many cases, which permits the court to ignore the prenuptial agreement in the case of a significant injustice. Given that a central motivation for executing a prenuptial agreement is to avoid interspousal statutory obligations and rights, a court might quite easily regard an agreement that achieves this as giving rise to a “significant injustice”.

In 2006, the Law Society of England published a document entitled “Family Law Protocol” which set out appropriate protocols for making of ancillary relief orders on marital breakdown.⁵⁰ The protocol notes the ongoing rapid changes and developments in the law relating to marital agreements, including agreements made before marriage. In addition, they identify the current trend for “the courts to show an increasing willingness to respect agreements freely entered into between the parties, especially in relation to prenuptial agreements”.⁵¹

48 *Ibid.*

49 *Ibid.*

50 Law Society of England, Family Law Protocol, *available at*: <https://www.lawsociety.org.uk/Practice-areas/F/Family-children/Family/family-law-protocol-part-1/> (last visited on January 11, 2018).

51 *Ibid.*

Europe

Prenuptial agreements have long been recognized as valid in several European countries, such as France, Belgium, the Netherlands, Germany, Poland, Switzerland, Sweden, Denmark, Norway and Finland.⁵² However, it is also found that spouses in many European countries resist premarital or marital agreements because they think that such documents are only important upon divorce; when they establish the consequences of divorce. Therefore, spouses often do not enter into such agreements because they want to underscore that they are not going to divorce.⁵³

When the codified systems of law in many countries of the European Union are looked at, one will find statements about the rights and duties of couples who have formalised their relationship, dealing with such matters as the choice of family home. The marital agreement has a different meaning in Europe than in the United States, and differing meanings within Europe as well. In Europe, the regime choice made by the spouses in a marital agreement mainly impacts how property is held during the marriage and which property is available to the creditors of one spouse.⁵⁴ While the rules of distribution of property upon divorce are also determined by the chosen regime, spouses can modify them only in a very narrow way through the marital agreement.⁵⁵ In some countries, a marital agreement concerns only the relations between spouses, while in others, the agreement may regulate the consequences of a spouse's death. Therefore, two fundamental approaches to marital agreements can be distinguished in Europe. According to the first one, the marital agreement is a kind of general agreement, constructing the rules of the classification of property and the relations of the spouses, but on the other hand, not regarding any particular property. The second approach is based on the rule that each contract between spouses is a marital agreement, even if it concerns only certain chattels belonging to one spouse.⁵⁶

52 Ford, Kwan & Co., *The Enforceability of Prenuptial Agreement in Hong Kong*, available at: <http://www.fordkwan.com/en/download.php?id=67> (last visited on January 8, 2018).

53 Margaret Ryznar and Anna Stêpieň-Sporek, "To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context", 13(27) *Chapman Law Review* 43.

54 *Ibid.*

55 *Ibid.*

56 Ana Krutik, *Analysis of Possibility of Harmonization of Prenuptial Agreements in the European Union* (2017) (Unpublished Undergraduate Thesis, Tallinn University of Technology). See also: Margaret Ryznar and Anna Stêpieň-Sporek, "To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context" 3(27) *Chapman L.Rev.* 27 (2010); Prenuptial Agreements in Contemplation of Divorce: European and Italian Perspectives, available at: <http://www.giacomooberto.com/prenuptial> Oberto_traccia_relazione_Genova_28_maggio_2014.htm (last visited on December 13, 2017); Prenuptial Agreements Around the World, available at: <http://www.internationalprenuptials.com/prenuptial-agreements-around-the-world.html> (last visited on December 13, 2017).

While in some of these countries there are limits on what restrictions the courts will see as enforceable or valid (e.g., Germany after 2001, where appeal courts have indicated this), a written and properly initiated contract, freely agreed upon, cannot be challenged by the parties. For instance, invoking the circumstances under which the marriage broke down or the conduct of either part. In France and Belgium (as in Quebec, which has the same judicial tradition) prenuptial agreements must be set up in the presence of a notary. Prenuptials may also protect the non-shared property and money from being pulled into a bankruptcy and can serve to support lawsuits and settlements during the marriage.⁵⁷

Numerous European nations met at the Hague Convention on “Law Applicable to Matrimonial Property Regimes” in 1978 to discuss prenuptial agreements.⁵⁸ The nations in attendance drafted 31 Articles that would govern international prenuptial agreements. Prenuptial agreements which are signed or enforced in Europe may be controlled by the laws of the Convention. The Convention’s Articles were only ratified by five of the E.U. countries, *viz.*, Austria, France, Luxembourg, Netherlands, and Portugal. This can create complications for a couple’s prenuptial agreement. If the couple resides, marries, or has designated the law of a non-Hague Treaty Country, or the divorce case is heard in a non-Hague Treaty country, the situation becomes strikingly more complex.⁵⁹

V. Contours of a Prenuptial Agreement

Given all the discussion about prenuptial agreement, the meaning and ambit of this term as well as its validity remain grey areas. The debate could be conciliated if the following criteria are met:

- (i) It should be fair, just, without any kind of force, fraud, coercion, undue influence, misrepresentation, and should be voluntarily entered into-the acceptance made should be absolute;
- (ii) Each of the disclosures made herewith shall be true, and to the best of knowledge of the parties. Any subsequent forgery detected shall be made accordingly punishable;
- (iii) It shall be in accordance with the other requirements of a valid contract as defined under provisions of the Indian Contract Act, 1872, *viz.*:

57 *Ibid.*

58 Chaninat and Leeds, International Prenuptial Agreements Part VI: European Prenuptial Agreements and The Hague Convention, *available at*: <http://www.thailawforum.com/laws/International%20Prenuptial%20Agreements%20Part%20VI.pdf> (last visited on December 14, 2017).

59 *Ibid.*

- (a) The parties should be competent to contract;⁶⁰
- (b) The parties should be of sound mind;⁶¹
- (c) Any contract made without free consent or under any kind of undue influence shall be treated as void, or at least voidable at the instance of the distressed party;⁶²
- (d) Any agreement made under a mistake of fact;⁶³
- (e) Any agreement requiring the payment of any kind of dowry shall be void in the eyes of law, as it would be unlawful in part;⁶⁴
- (f) The agreement shall not restraint any right of legal proceedings;⁶⁵
- (iv) In case marriage is between minors or any disabled persons, for purposes of the provisions on marriage settlement, however, a 'minor' refers to those at least 18 years old but below 21, who need their guardians' consent to get married.⁶⁶ Those who are designated by law to give consent, primarily the parents, must also sign the document in order for it to be valid;
- (v) It must be in writing, registered,⁶⁷ and duly acknowledged with witnesses, just like any other legal document in India;
- (vi) It should be reviewed by separate lawyers, representing each of the parties, and duly certified by them, in order to avoid inconsequential disputes in the future regarding its contents, etc. that may delay the entire process;
- (vii) It should require the complete and honest disclosure of each spouse's assets and liabilities, along with their credit standing, income statements, and debts if any, etc., including their health ailments, if any;
- (viii) It should be able to cover all the aspects of-
 - (a) each party's assets, inheritances, debts, and property rights before the marriage;

60 Indian Contract Act, 1872, s. 11. However, the age criteria herein would be in accordance to the marriage laws prevalent in the jurisdiction of the country to which the parties belong to.

61 *Id.*, s. 12.

62 *Id.*, ss. 19-19A.

63 *Id.*, ss. 20-23.

64 *Id.*, s. 24.

65 *Id.*, s. 28.

66 According to the 1999 Amendment to the Indian Registration Act, 1908, which removed the necessity of parental consent.

67 Most likely with the Registrar under whose domain such marriage is to be registered.

- (b) settling issues of division of property after the death of either of the parties;
 - (c) spousal support in the event of breakdown of marriage;
 - (d) the right of maintenance and allowances of each of the spouse-both within the marital knot, and subsequent to divorce;
 - (e) custody of children in case of breakdown of marriage;
 - (f) position of children born out of any previous wedlock; and
- (ix) It may also additionally have a clause stating that if any provision of the agreement is invalidated, the rest of the agreement remains in effect, failing which the entire efforts of making a “prenuptial agreement” would become futile.

A valid prenuptial agreement thus has some basic requirements like, it must be entered by both the parties with free will and mutual consent and because agreement will be invalidated if found that it is resulted out of coercion or undue influence. The structure of agreement and what all subject matters should be included in it will be decided by parties but there should be a model “prenuptial agreement” provided by state, laws relating to enforceability like compulsory registration of marriage, evidence attachment regarding property listed and other financial disclosure, dispute redressal mechanism, laws to be applicable, etc. The structure of “prenuptial agreement” differs from place to place according to requirements of legal system of that state.

Premarital Mediation

In certain cases of matrimonial remedy, under section 23(2) of the Hindu Marriage Act, 1955 a duty is imposed on the court to endeavour to bring about a reconciliation between the disputed parties.⁶⁸ It is found to be a good exercise in disposing of matrimonial disputes speedily wherein both the parties open before the mediator and express their concerns. This exercise has also brought pre-litigation options to the parties to dispose of their matters amicably. Similarly, we need to consider premarital mediation in our legal system. Premarital mediation is an alternative way of creating a “prenuptial agreement” for the wellbeing of prospective couples. A mediator facilitates an open discussion between the couple about all kinds of marital issues, like expectations about working after marriage and/or children from the wedlock, saving and spending according to living styles as well as the traditional premarital discussions about property

68 For more details, see the Hindu Marriage Act, 1955, s. 23. See also the Special Marriage Act, 1954, s. 34.

division and spousal support, if the marriage is terminated.⁶⁹ The prospective “couple makes all decisions about what would happen in the event of a separation or divorce with the assistance of the mediator”⁷⁰. They then draft either a deal memo or a “premarital agreement” and have it reviewed by their respective advocates. An agreement developed via mediation is typically less expensive because fewer hours are spent with advocates because the couple has made all of the decisions together, rather than one side versus the other.

The contents of a prenuptial agreement may vary but commonly includes provisions for division of matrimonial property, spousal support, bearing and rearing of child and matter relating to custody of children in the event of divorce or breakdown of marriage. Therefore, a prenuptial agreement “is an agreement made between a couple that’s about to get married that outlines the fate of finances and personal liabilities in case the marriage fails”⁷¹. The prenuptial agreement is characterized by great flexibility and can be tailor-made to the specific needs of the couple.⁷²

Essentials of Prenuptial Agreement

A prenuptial agreement which may suit Indian socio-economic, cultural and legal eventualities should include these aspects, namely Party Information; Customs to be Followed; Marriage Expenses; Establishment of Matrimonial Home; Assets and Liabilities; Allotment of Property; Other Financial Disclosures; Alimony, Support and Maintenance; Children; Application of Law; Additional Clauses; and Enforcement of Prenuptial Agreement.

VI. Conclusion

It has been sufficiently established that prenuptial agreements have existed in some form or the other since the Ancient times in India, even when marriage was more of a sacrament and less of a contract between the two parties. Now that marriages are regarded less as a union of two families and more a union of two independent, equal parties, the customary method of enforcing terms and conditions on each spouse and his or her family is fading away. However, this does not mean that a newer, modern interpretation of the prenuptial agreement cannot become a worthy successor.

In this paper, the researcher has dwelt significantly upon the merits and demerits of prenuptial agreements, especially when proper measures are followed and care is taken

69 McNamee Mediations ‘*Prenuptial Agreements*’ available at: <https://mmediations.com/services/prenuptial-agreements/> (last visited on December 18, 2017).

70 Judith M. Goldberg ‘*Prenuptial Agreements*’ available at: <https://judithgoldberg.com/ct/practice-areas/family-law/prenuptial-agreements> (last visited on December 18, 2017).

71 *Supra* note 9.

72 *Supra* note 6.

to ensure no party's vulnerabilities are exploited. There is sufficient proof to establish that these agreements can help reduce marital conflict and increase the stability of marriage. At the very least, they can help make the process of divorce smoother and speedier and especially benefit children, not only granting them additional rights and benefits but also protecting them from the toxicity of a long, drawn out, and inevitably bitter court proceeding. As the world hurtles towards a developmental and technological revolution, lawmakers are scrambling to update their laws of prenuptial agreements to keep pace with the demands of their societies. This change can be seen across countries and continents, irrespective of religion. It is especially heartening given the fact that transnational marriages are also on the rise.

After having explained the "prenuptial agreement", its merits and demerits, with comparative analysis of laws of other jurisdictions and laws applicable among them, the researcher is of the considered opinion that Indian society, irrespective of its multiplicity, has matured enough to accept prenuptial agreements. Moreover, adaptability has been the distinctiveness of Indian society and its uniqueness its strength. However, Indian law makers are to be convinced to frame suitable law to govern "prenuptial agreement". The researcher hopes that this move would greatly contribute in stability of marriage institution among young citizens of India, as this country has more young people than any other country. In contemporary society, there is a sense of insecurity in the minds of the single and eligible youths about the success of marriage. Further, young couples nowadays are moving worldwide due to their jobs or professional requirements and, in absence of any written and duly authorised document about their marriage, they suffer due to the lack of many legal benefits. The detail of a model "prenuptial agreement", as provided above, may vary from person to person, place to place, society to society, etc. Yet, it will provide due authorisation to the marriage with a written document.

Therefore, budding divorce lawyers are required to develop their skills to meet professional requirements to supply a well-designed written agreement to the parties to the proposed marriage. The contours of this written agreement have to be especially intricate in order to ensure that neither party is wronged. Hence, any well-designed prenuptial agreement must be drafted according to the demands of the Indian Contract Act, 1872 and should include possible redressal of any foreseeable mishap in the marriage. Given the rich and diverse culture of the country, and the rise of love marriages or love-cum-arranged marriages amongst couples of varying backgrounds, it is imperative that the parties come to some sort of predetermined acceptance of how to navigate the melting pot of their customs, rights and obligations, both during and after the marriage. Thus, there is an urgent need to have this kind of agreement in force as early as possible, so that young people may get a sense of security of marriage and, if it fails, they may be sure of legal remedy based on the proposed agreement.