

PRENUPTIAL AGREEMENTS IN THE INDIAN CONTEXT: A COMPARATIVE ANALYSIS

Abstract

This paper explores the legal status and the potential enforcement of prenuptial agreements in India by comparing the legislative and juristic development of these agreements in the United States (US) and United Kingdom (UK). Western jurisdictions witnessed the evolution of these agreements starting with judicial skepticism but finally culminating in conditional acceptance and enforceability. India, already shaped by its various personal laws and its predominance view of marriage as a sacrament, presents a fragmented and largely uncertain approach to Pre- Nuptial Agreements (PNAs). This paper delves into judicial decisions under Hindu and Muslim laws to argue that though PNAs are explicitly recognised by Indian law, they have always played a role in firming up marital relationships. It then further examines where the enforceability of these contracts would present any hurdles from the Indian Contract Act. Ultimately, the paper advocates for the enforceability of PNAs in the backdrop of a uniform framework of personal laws while balancing the principles of consent, fairness and autonomy without undermining the cultural sensitivities around marriage. Only such a framework can usher in transparency and certainty in this respect.

I Introduction

MARRIAGE IS a legal institution that represents one of the significant outcomes of social evolution. Societies have progressed from communal living arrangements to recognising monogamy as a foundational element of social organisation.¹ Over time, the institution of marriage has evolved from merely a social or practical arrangement to one that is increasingly shaped by legal norms and state intervention.² Modern legal systems not only acknowledge marriage but also regulate its various facets, thereby introducing contractual elements into what was traditionally a cultural and personal institution.³ The dual nature of marriage, as both a personal bond and a legal contract, has led to the emergence of mechanisms designed to manage its potential dissolution. Among these are PNAs which allow couples to regulate matters such as

1 Stephanie Coontz, *Marriage, a History: From Obedience to Intimacy or How Love Conquered Marriage* (Penguin, 2005), which traces the transformation of marriage from economic alliance to a romantic partnership.

2 Lawrence M. Friedman, *A History of American Law*, 3rd edn. 203–208 (Simon and Schuster, 2005), which discusses the increasing role of the state in regulating domestic relations.

3 Mary Ann Glendon, *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe* (University of Chicago Press, 1989), which outlines how modern legal systems have embedded contractualism within family law.

property division, custody, and financial obligations in the event of a breakdown of the marriage.⁴

In the US, such agreements have seen a long judicial and legislative trajectory. Early judicial skepticism, revolving around public policy concerns and sanctity of marriage, created an impression that such agreements were antithesis to the marriage legal framework. Key decisions such as *Posner v. Posner* and *Scherer v. Scherer* saw the gradual embrace of these agreements, albeit with conditions. The legislative backing these agreements got through laws passed in 1983 and 2012 further codified these developments by providing standardised legal frameworks. Today PNAs in the US enjoy ease of enforceability

The UK has followed a more cautious tone. Long governed by common law and public policy considerations, PNAs were historically seen as unenforceable if they were perceived as waiving spousal maintenance or encouraged marital breakdown. A major breakthrough came in the case of *Radmacher v. Granatino* where the UK Supreme Court held that a contract freely entered into by adults who are fully aware of the consequences should be given weight, unless its enforcement would result in unfairness. The Law Commission report on what they called “Qualifying Nuptial Contracts” represent a move towards statutory clarity while still emphasising on fairness and justice.

In contrast, India presents a complex picture. India is governed by a complex legal system rooted in religious and personal laws. This framework does not explicitly recognise prenuptial agreements. Under Hindu law, additionally marriage is seen as a sacrament while other personal laws have accommodated contractual elements in it. As a result, it becomes tricky to craft such agreements around such limitations, if at all they are crafted. However, both Muslim and Christian personal laws have long accommodated contractual elements in marriage. Muslim *kabinamas* often contain clauses on maintenance, housing, and conduct within polygamous arrangements, some of which have been upheld by courts. Even within Hindu law, courts have occasionally enforced agreements that align with customary practice, suggesting a latent but underdeveloped space for PNAs in Indian jurisprudence.

This paper explores the legal evolution of prenuptial agreements in the US and UK, contrasts them with the Indian legal position, and argues for a reassessment of the Indian framework regarding them. As social norms shift and marital autonomy becomes more central, there is an urgent need to develop a legal structure that balances contractual freedom with the unique sensitivities of Indian personal law traditions.

4 Jill Elaine Hasday, “The Canon of Family Law,” 57(3) *Stanford Law Review* 825–891 (2004), which discusses the role and legal status of prenuptial agreements in shaping modern family law.

II A cross-jurisdictional analysis of prenuptial agreements

United States

Marriage in the US has been historically viewed as both a contract and a state regulated institution. In *Maynard v. Hill*⁵, the Supreme Court ruled that marriage was more than a mere contract between individuals: it is an institution of society subject to legislative control. Therefore, laws affecting marriage, including annulment and divorce, were not subject to the constitution prohibition against the impairment of contracts by State legislation. This principle was reaffirmed in *Obergefell v. Hodges*⁶ where the Supreme Court ruled that the right to marry was a fundamental constitutional right, further emphasising that marriage was not merely contractual but an institution regulated by State.

Courts have historically dealt with both prenuptial and postnuptial agreements in the context of property rights after divorce.⁷ However, agreements that sought to waive spousal support, such as alimony, were often struck down as contrary to public policy. Cases like *Lindsay v. Lindsay*⁸, *Oliphant v. Oliphant*⁹ and *Raymond v. Raymond*¹⁰ reinforced the principle that PNAs cannot undermine the state interest in protecting the financial security of a divorced wife. Another argument against PNAs was that it went against the sanctity and dignity of marriage.

A significant shift occurred in *Posner v. Posner*¹¹ when a Florida Supreme court held that PNAs were not automatically void as against public policy. While the ruling did not grant automatic enforceability, the case marked the beginning of judicial recognition of PNAs as legally significant contracts.

A landmark moment came in *Scherer v. Scherer*¹² where the Georgia Supreme Court laid down a three pronged test for determining the enforceability of PNAs: (i) whether the agreement was obtained through fraud, duress, mistake, misrepresentation or non disclosure (ii) whether the agreement was unconscionable and (iii) whether circumstances had changed since the execution to make enforcement unfair. This decision effectively overruled *Reynold v. Reynold*,¹³ which held that agreements

5 125 US 190 (1888).

6 576 US 644 (2015).

7 A.A. Marston, "Planning for Love: The Politics of Prenuptial Agreements", 49(4) *Stanford Law Review*, 887-913 (1997).

8 238 S.E.2d 817 (1977).

9 7 SW2d 783, 177.

10 190 S.W. 3D77.

11 233 SO. 2d 381 (Fla. 1970).

12 292 s.e.2d 662, ga. 1982.

13 297, Mo. 447.

contemplating divorce were contrary to public policy. Instead, *Scherer* clarified that such agreements were enforceable so long as they met fairness and procedural safeguards.

Further strengthening the contractual legitimacy of prenups, *Simeone v. Simeone*¹⁴ rejected the paternalistic judicial approaches that sought to protect spouses from agreements that they had voluntarily entered into. The Pennsylvania Supreme Court ruled that PNAs should be evaluated using standard contract principles, without additional scrutiny simply because they involved marriage. This decision reinforced that a lack of full understanding of financial terms was insufficient to invalidate an agreement, provided there was no fraud or coercion.

The enforceability of prenups was further refined by *Button v. Button*¹⁵ where the Wisconsin Supreme Court introduced the “dual fairness test” - requiring that an agreement be fair both at the time of signing and at the time of enforcement. This approach ensured that PNAs remained equitable throughout the marriage and divorce process.

Standardisation of PNAs laws came with the passage of the Uniform Premarital Agreement Act¹⁶ in 1983, drafted by the National Conference of Commissioners on Uniform State Laws. The UPAA provided a legal framework for PNAs and was adopted by most states. It defined a premarital agreement as an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.¹⁷ The statute specified provisions that prenups could regulate, including:

- (i) The rights and obligations of each of the parties in any of the property or both of them whenever and wherever acquired or located;
- (ii) The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
- (iii) The disposition of property upon separation, marital dissolution death, or the occurrence or the nonoccurrence of any other event;
- (iv) The modification or elimination of spousal support;
- (v) The making of a will, trust, or other arrangement to carry out the provisions of the agreement;

14 525 Pa. 392, 581 A.2d 162 (1990).

15 EWCA Civ J0130-3.

16 UPMAA, 2012.

17 UPMAA, 2012, S. 2

- (vi) The ownership rights in and disposition of the death benefit from a life insurance policy;
- (vii) The choice of law governing the construction of the agreement; and
- (viii) Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

To be valid, the UPAA required PNAs to be in writing and signed by both parties.¹⁸ Some states imposed additional formalities, such as notarisations, depending on socio economic conditions.

In *Re Marriage of Dawley*¹⁹, the California Supreme Court ruled that PNAs were not inherently against public policy, provided they were voluntarily and freely entered into. This decision helped normalise PNAs for financial planning rather than as tools designed to undermine change.

The legal landscape further changed with the Uniform Premarital and Marital Agreements Act of 2012, (UPAA) an update to the earlier UPAA. The UPMAA introduced stricter requirements to ensure PNAs were entered into voluntarily, with full financial disclosure and no coercion. In the significant ruling of *Re Marriage Bonds*²⁰ (2000), the court addressed the role of a legal counsel. The court held that the absence of a legal counsel for one spouse did not automatically invalidate a PNA, provided there was no coercion. This decision underscored the court's focus on balancing contractual freedom with procedural fairness.

The evolution of PNAs in the US reveal a trajectory that has moved from initial skepticism to structured acceptance. The courts have progressively embraced them as valid contracts while ensuring fairness through substantive and procedural safeguards.

United Kingdom

The legal framework of marriage in the UK has long been shaped by both common law principles and statutory interventions. One of the earliest and most influential cases in this regard is *Hyde v. Hyde*²¹ decided by the High Court of Justice, Family Law Division. Mt Hyde who had married under Mormon laws in the US (which permitted polygamy) sought a divorce on the grounds of his wife's adultery. By this time, he had left the Mormon community, while his wife remained in it. The court, therefore, had to deliberate on the legal nature of marriage itself. Lord Penzance opined that marriage was a contract that created a legal status and famously defined

18 *Ibid.*

19 551 P.2D 323 (1976).

20 99 Cal, Rptr, 2d 252 (2000).

21 (1866) LR 1 P and D 130.

it as “*the voluntary union for life of one man and one woman, to the exclusion of all others.*” Though this definition was not part of the *ratio decidendi*, it became a guiding principle for other such cases, shaping the legal understanding of marriage in English Law.

Although marriage statutes had existed since the 18th Century, they were largely implemented by ecclesiastical courts. However, a significant shift occurred with the passage of the Matrimonial Causes Act,²² which established civil courts to oversee divorce proceedings. This was a crucial moment in moving marriage out of the exclusive domain of religious sacraments and into realm of contractual relationships, as it allowed for secular divorce.

One of the earliest, notable cases involving prenuptial agreements was *Hyman v. Hyman*.²³ In this case, a husband and wife had entered into a separation contract that prevented the wife from seeking maintenance beyond what was agreed upon in the contract. However, after the divorce, Hyman approached the court for additional support. While the court upheld the validity of the agreement, it ruled that a private contract could not waive the statutory right to maintenance, as such against public policy. This judgment reinforced the principle that public interest considerations could override private agreements in marriage related matters.

Subsequent legal developments included the Marriage Act of 1949 that provided a comprehensive statutory framework for marriage but did not address divorce. The Matrimonial Causes Act of 1973 was more consequential in shaping financial arrangements upon divorce. It consolidated several changes and allowed for the enforcement of maintenance agreements between spouses. The Act introduced a system of fairness in financial settlements and established mechanisms for proprietary adjustment orders. However it did not provide statutory recognition for prenuptial agreements, which remained governed by common law.

Despite the absence of legislative backing, prenuptial agreements continued to be governed by common law. Courts primarily assessed them through general contractual principles, focusing on issues such as fairness and public policy. A landmark case in this regard is *Radmacher v. Granatino*.²⁴ The case involved a French husband and a German wife who had entered into a prenuptial agreement three years before their marriage. A key clause in the agreement prevented both parties from acquiring each other’s property during and after the marriage. Initially, a lower court set aside the agreement on grounds that included the lack of legal counsel for the husband and lack of non disclosure of assets by the wife.

22 UK Public General Acts, 1857 c. 85 (Regnal 20 and 21), *available at* : https://www.legislation.gov.uk/ukpga/Vict/20-21/85/pdfs/ukpga_18570085_en.pdf(last visited on July 29, 2025).

23 [1929] AC 601.

24 [2010] UKSC 42.

When the case reached the UK Supreme Court, it issued a ground breaking ruling that the “*agreement was freely entered into by each [party with full appreciation of implications unless in the circumstances prevailing it would not be fair to hold the parties to the agreement.]*” The court established a three step test to determine enforceability of prenuptial agreements, Firstly whether, it was entered into freely by the parties; Secondly whether, parties were aware of the implications of its contents which includes full disclosure by the parties themselves; the enforcement of the agreement must be fair to both parties. The last point will depend on the factual contexts of the parties post the divorce and one that the courts will have discretion in determining.

The ruling emphasised that prenuptial agreements are not automatically enforceable but should not be considered binding unless they produce unfair results. This decision significantly increased the weight given to prenuptial agreements in English law and encouraged wider adoption.

The post *Radmacher* era saw a marked increase in the use of PNAs in the UK. Their enforceability, however, remained subject to judicial scrutiny. Recognising the growing significance of these agreements, the Law Commission published a consultation paper in 2013 on what it termed Qualifying Nuptial Agreements.²⁵ This emerged in response to the Family Justice Review which urged the government to consider financial settlement laws in divorce cases.

Under existing common law principles, PNAs are still required judicial approval to be enforced, as courts retained the discretion to set them aside if they were deemed unfair. The Law Commission proposed that for greater legal predictability, couples should be allowed to draft and enforce agreements on property distribution without court intervention, provided certain conditions were met.

The Commissions’ recommendations included:

- (i) Allowing couples to contractually exclude or include property in financial settlements upon divorce.
- (ii) Ensuring agreements comply with fundamental formal requirements, such as full disclosure of financial assets and independent legal advice for both parties.
- (iii) Preventing parties from making binding arrangements on housing, childcare, or ongoing income needs, as these matters could not be “irrevocably” determined through private contracts.

These recommendations sought to align UK law with broader European practices, recognising the increasing acceptability of prenups while preserving judicial oversight

25 *Matrimonial Property, Needs and Agreements*, Law Commission report, Dec 2024, available at: <https://lawcom.gov.uk/project/matrimonial-property-needs-and-agreements/#2-Project> (last visited on July 15, 2025).

to ensure fairness. Thus, the evolution of PNAs in the UK reflects a gradual shift from judicial skepticism to cautious acceptance. While early legal frameworks prioritised public policy concerns over contractual freedom, landmark cases such as *Hyman* and *Radmacher* helped establish clear guidelines for their enforceability. The Law Commission's 2013 proposals further emphasised the need for predictability while balancing it with judicial oversight.

Comparative analysis at a glance

Criteria	United States	United Kingdom	India
Legal nature of marriage	Marriage vowed as both a contract and a site regulated institution. (Maynard v Hill; Obergefell v Hodges)	Marriage is as a contract creating a legal status, subject public policy and statutory control (Hyde v Hyde)	Varies by personal law; sacrament under Hindu law; contractual under Muslim law; mixed approach under Christian Law
Historical attitude towards PNAs	Initially hostile	Traditionally unenforceable; viewed as waiving statutory rights and encouraging marital breakdown.	General sceptic; struck down as contrary to public policy or personal law doctrines.
Judicial shift towards acceptance	Clear shift beginning with Posner v Posner; consolidation further through Scherer v Scherer and Simeone	Major turning point in Radmacher v Granatino (2010), recognising weight of freely entered agreements.	No clear judicial shift; courts uphold agreements occasionally if aligned with custom or personal laws.
Statutory Framework	Uniform Premarital Agreement Act (1983) and Uniform Premarital Marital Agreements Act (2012).	No direct statutory recognition; Law Commission (2013) proposed "Qualifying Nuptial Agreements."	No specific statutory framework; governed directly through personal laws and Indian Contract Act/
Formal requirements	Writing and signatures mandatory; full disclosure and voluntariness emphasised; legal counsel encouraged	Full disclosure, voluntariness and awareness of consequences; independent legal strongly preferred.	No uniform formal requirements.

Substantive fairness	Courts assess fairness at execution or at enforcement.	Enforcement subject to fairness at the time of divorce.	Fairness often assessed through public policy lens; agreements encouraging separation invalidated.
Treatment of maintenance/alimony	Waiver or modification permitted subject to fairness or disclosure.	Maintenance rights cannot be entirely excluded if unfair	Maintenance clauses upheld in in Muslim law on reasonable; generally scrutinised under Hindu Law
Public Policy considerations	Reduced over time; contract; autonomy increasingly prioritised.	Still significant; private agreements cannot completely statutory safeguards.	Central ground for invalidation, especially where agreements anticipate separation or divorce.
Role of courts	Limited intervention once procedural and substantive safeguards are met.	Strong judicial discretion retained despite growing acceptance.	Extensive intervention, courts actively test agreements against morality, custom and public policy.
Current legal status	Largely enforceable Largely enforceable	Persuasive but not binding	No clear legal recognition.

Autonomy, family diversity, and the contractualisation of marriage

Beyond the formal legal doctrine, the enforceability and social legitimacy of PNAs are closely tied to each jurisdiction's cultural conditioning and its recognition of non traditional family forms.

In the United States, the gradual normalisation and acceptance of PNAs coincided with a broader shift towards recognising marriage as an expression of individual autonomy rather than a fixed moral institution.²⁶ This is reflected not only in the flexible approach to same sex marriages and live in relationships, but also in the widespread use of assisted reproduction technologies and surrogacy arrangements. The contractual orientation of family law in the US has thus created a cultural and legal environment conducive to the enforcement of PNAs.²⁷

²⁶ *Maynard v. Hill*, 125 U.S. 190 (1888); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

²⁷ *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

The UK presents a more cautious model. While same sex marriages²⁸ and cohabitation relationships enjoy a legal status, family law continues to be anchored in the judicial notions of fairness and welfare. Surrogacy, though permitted, is tightly regulated and framed through altruistic rather than contractual lenses.²⁹

In contrast, India's ambivalence towards PNAs mirrors its broader discomfort with non traditional family structures, as will be elaborated shortly. Although same sex marriages and live in relationships have received limited constitutional and judicial recognition, they continue to lack comprehensive legislative protection. Surrogacy has undergone a restrictive regulator shift, reinforcing State's preference for traditional family models.

III Where is India in this journey?

Although there are many opinions on whether prenuptial agreements are valid in the context of Indian marriages, it is indisputable that they have had a strong presence in Indian Family Law jurisprudence. The question of enforceability is complex, as different religious traditions and statutory frameworks have shaped the legal treatment of such agreements.³⁰ Muslim marriage, being classified as civil contracts rather than sacramental unions, have historically involved contractual agreements between the groom and the bride's father, often stipulating conditions related to maintenance and marital responsibilities. Similarly, Christian marriages, governed by the Divorce Act of 1869 allow courts to examine any prenuptial agreements that may exist at the time of separation. Under Hindu Law, however, courts have scrutinised such agreements through the lens of whether they comply with the established principles of Hindu marriage, often striking down clauses that explicitly encourage or separation or violate public policy.

Muslim law

In Muslim Law, prenups are commonly referred to as *Kabirnama*, which stipulate various aspects of marital life, including financial arrangements, housing conditions and in some instances, terms regulating when a husband may leave a wife. These arrangements often serve more as broad guidelines for the conduct of the marriage rather than an instruments governing the consequence of a marital breakdown. For instance, in *Buffatan Bibi c Abdul Salam*³¹, a *Kabirnama* clause stipulated that in the event of marital discord, the wife could reside in her father's house and if the husband failed to resume maintenance payments within six months, she would have the right

28 Marriage (Same Sex Couples) Act 2013 (UK).

29 *White v. White* [2001] 1 AC 596 (HL).

30 Prenuptial Agreements in India: An Analysis of Law and Society, Amrita Ghosh and Pratyusha Khar

31 1950 SCC OnLine Cal 28 : AIR 1950 Cal 304

to divorce him. Some *kabirnama* also address polygamous arrangements, detailing how a husband should treat his new wife in relation to his existing spouses - whether he can house them together, how frequently he can visit each and other aspects of cohabitation.

At times, non-compliance with contractual clauses results in automatic dissolution of marriage, ending up in courts to assess whether such provisions encourage separation and therefore contravene public policy. However, if an agreement aligns with prevailing community customs, courts have been more than willing to uphold it. For example, in *Khatun Bibi*³², where a wife sought divorce due to her husband's non compliance with a contractual obligation, the High Court of Allahabad invalidated the contract, deeming it contrary to public policy. The contract had mandated that the husband reside with the wife and her family as a condition to marriage. Conversely, in *Mohd Khan v. Shahmali*³³, where a husband was contractually bound to live in his wife's household, the court upheld the agreement on the grounds that it merely reinforced an existing community practice rather than imposing an undue restriction on marital autonomy.

Similar trends emerge in prenups concerning maintenance. Such agreements may impose financial obligations due to non-compliance, inaction or omission on the part of the husband. Courts have issued varying rulings on these provisions. In *Bai Fatma*³⁴, an agreement entitling the wife to a specified maintenance payments in the event of divorce was upheld. The distinction lies in the drafting: courts are not inherently opposed to maintenance provisions in prenups but are cautious about other provisions that could be interpreted as incentives for divorce. The language, intent and contextual framing of the clause are crucial in determining enforceability.

Hindu law

A similar judicial approach is evident in cases concerning prenups under Hindu Law. Here, the additional challenge arises from the traditional view that Hindu marriage is not merely a contract but a sacramental union. This perspective affirmed in multiple judicial pronouncements, including the landmark *Krishna Aiyar* case where the court emphasised that marriage under Hindu law is not a contractual arrangement but a sacred bond.³⁵ Consequently, any PNA that anticipates future separation is deemed to contrary to public policy and thus unenforceable. Thus, where in a case the husband and wife agreed to live separately, the courts disallowed its execution on the ground that it encouraged separation and as a consequence contrary to public policy.³⁶

32 1926 SCC OnLine All 134 : AIR 1926 All 615

33 1971 SCC OnLine J and K 32 : AIR 1972 J and K 8

34 ILR (1913) 37 Bom 280 : (1912) 14 Bom LR 1178.

35 *Krishna Aiyar v. Balammal*, AIR 1911 Mad 409 (High Court of Madras).

36 *Ibid.*

In fact, courts have used the ground of public policy very broadly to arrive at these decisions disfavouring prenups. In cases such as *Paige v Sheonarain*³⁷, *Tikait Mon Mobini v. Basanta Kumar Singh and Sri Bataba Pati*³⁸, the court held agreements willingly entered into by both parties as non enforceable on the ground that the object of the same was “bizarre”, “instigated future separation” and “opposed to public policy.” All three cases dealt with an agreement where the husband was supposed to take residence in the wife’s house and later changes his mind to shift to his own house. The court allowed for this on the ground that Hindu law envisages that the wife joins the husband in his house, although in later judgements they have nuanced this approach in a refined manner.

If one were to take a look at cases where the courts have taken a more favourable view, it is in most cases where the object of the contract aligns with personal laws and tradition. Thus, cases where the husband was promised a gift after the marriage had been conducted, the court found that it was a valid contract and not opposed to public policy.³⁹ Possibly because giving the groom a gift at the time of marriage is not entirely a strange thing to do. Most importantly, the High Court of Calcutta has held that while declaring a contract to be invalid on the ground of public policy, the courts also have to give paramount importance to the fact that two consenting adults had willingly entered into an agreement.⁴⁰

Despite these judicial trends, the presence of prenups cross different personal laws demonstrates that such contracts have played a significant role in regulating marital relationships in India. While courts have historically been reluctant to enforce them due to concerns about public policy and the sacramental nature of Hindu marriage, the growing prevalence of contractual understandings in modern relationships calls for a reassessment of their legal status. A more nuanced approach - one that distinguishes between agreements that promote fairness and security versus those that encourage dissolution - may provide a more balanced framework for their enforcement in Indian legal system.

Recognition of prenuptial agreements under Indian personal laws: A fragmented and contextual approach

As stated earlier, this paper notes that Indian family law recognises pre nuptial agreements but it has to be stated with the caveat that it does not do so in the formal or statutory sense like in the US or UK. But Indian family law has never been wholly

37 1885 SCC OnLine All 24 : ILR (1886) 8 All 78.

38 1901 SCC OnLine Cal 60 :

39 *Pran Mohan Das v. Hari Mohan Das*, 1924 SCC OnLine Cal 94 : AIR 1925 Cal 856.

40 *Printing and Numerical Registering Co. v. Sampson*, (1875) 19 Eq 462.

alien to pre marital or marital agreements but the recognition itself has been fragmented, indirect and contextual.⁴¹

Among Indian personal laws, Muslim law offers the clearest illustration of recognition to PNAs. A Muslim *nikah* is indisputably treated as a civil contract and the *nikahnama* often contains stipulations negotiated prior to or at the time of marriage. Courts have consistently acknowledged these stipulation, provided they do not offend public policy or Islamic principles.⁴²

In *Bai Fatma v. Ali Mahomet*, the High Court of Bombay upheld a contractual stipulation entitling the wife to maintenance upon divorce, recognising it as a valid term of marriage contract.⁴³ At the same time, as has been explained in the preceding chapters, courts have drawn limits through cases like *Khan Bibi v. Abdul Wahab* when the High Court of Allahabad invalidated a stipulation compelling the husband to permanently reside with the wife's family, reasoning that this imposed an unreasonable restraint on marital autonomy.⁴⁴

Christian marriages in India, governed also by the Indian Divorce Act, 1869 does not explicitly provide for PNAs. However, courts have not treated such agreements as per se void. Instead they have taken the stand of how these agreements may be taken into consideration during matrimonial disputes, particularly in matters relating to maintaining and property.⁴⁵ All in all, in Christian marriage contexts, courts have acknowledged that agreements into prior to marriage may be examined to assess the parties' intentions, though they do not override statutory discretion in awarding alimony or maintenance.

Finally, in Hindu law, one finds it to be markedly restrictive due to the long standing characterisation of marriage as a sacrament rather than as a contract. Courts have routinely invalidated agreements that explicitly anticipate separation or encourage future divorce. Cases such as *Tekait Mon* and *Paige* are examples of courts striking down agreements on the grounds of sanctity of marriage and public policy.⁴⁶ But Hindu law jurisprudence does also reveal limited recognition of PNAs when aligned with custom or legitimate marital objectives. Most notably the High Court of Calcutta judgment that observed that while public policy remains a ground for invalidation,

41 See generally Indian Contract Act, 1872; *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh*, (1901) ILR 28 Cal 751.

42 *Abdul Kadir v. Salima*, (1886) ILR 8 All 149.

43 *Bai Fatma v. Ali Mahomed*, (1912) ILR 37 Bom 280.

44 *Khan Bibi v. Abdul Wahab*, (1901) ILR 23 All 65.

45 See *Hyman v. Hyman*, [1929] AC 601 (

46 *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh*, (1901) ILR 28 Cal 751; *Paige v. Sbeonarain*, (1906) ILR 33 Cal 57.

courts must also account for consensual intent of adult parties entering into agreements voluntarily.⁴⁷

Thus, the claim that Indian family law does recognise PNAs must be understood in a qualified sense. Although it does not recognise them as uniformly enforceable contracts governing divorce, it allows them to operate through personal law doctrines, judicial validation of specific clauses and contextual scrutiny of public policy, custom and fairness.

IV Why PNAs will not violate contract law in India

A closer scrutiny of the prenuptial contracts in India reveal that most of them get struck down on either of the following two grounds: public policy or personal law doctrines.⁴⁸ This spells a great hurdle for prenuptial agreements to find relevance and enforceability in Indian courts. And thus, they need to find themselves in compliance with laws relating to contracts in addition to personal laws in the country.

The primary provision in this regard is Section 10 of the Indian Contract Act which defines when an agreement becomes a contract. It says all agreements entered into by the free consent of the parties who are competent to contract for a lawful consideration, with a lawful object is an enforceable contract. The object of a prenuptial agreement is equal and fair division of financial resources and assets in the event of divorce. This is a lawful object for which two consenting parties can agree to contract.

Section 25 deals with contracts without consideration. Although these contracts will not have any strict contractual considerations, they are still based on reciprocal promises and financial considerations agreed on by both parties. These promises may stem from moral obligations or family traditions. For instance, contracts that specify maintenance amounts for a wife should a Muslim man take on another wife stems from, as much as legislative considerations as they do from personal laws and tradition.

A more direct legal challenge may emerge from Section 26 that go on to lay down that contracts in restraint of marriages are void. If a prenuptial agreement directly and explicitly restrains a person from remarrying or marrying with conditions, then such an agreement is found to be void. In *Shravan Kumar v. Nirmala*⁴⁹, two persons entered into a contract whereby one party was prevented from marrying anyone but the other party. When the latter tried to enforce this contract in courts, it was found in violation of section 26. However, prenuptial contracts almost always detail division

47 *Printing and Numerical Registering Co. v. Sampson*, (1875) 19 Eq 462.

48 See generally *Mulla, Indian Contract Act* (LexisNexis, 16th edn, 2021) 95; also see *John Vallamattom v. Union of India* AIR 2003 SC 2902 (wherein the court discussed the interface of personal law and general law in India).

49 AIR 1983 MP 117.

of assets, financial arrangements and spousal maintenance rather than restrictions on marriage.

Another hurdle comes in the form of Section 74 that deal with liquidated damages in case of breach of contract. This Supreme Court has laid down in multiple cases that such damages cannot be excessive, that real loss must be shown to be suffered *etc.* Even if one were to argue that marriages are a contract, even in jurisdictions where they are seen solely as contracts, it is conceded that they are in addition, also a state regulated entity. Also, prenuptial contracts do not intend to penalise someone for seeking divorce. It merely lays down the framework should such an eventuality arise.

The Devlin–Hart debate and the Indian judicial imagination

Judicial resistance to PNAs have routinely been couched in language framed through public policy and morality. Courts have frequently invalidated these agreements on the ground that they undermine the sanctity of marriage, encourage separation *etc.* This raises important questions on the legitimate role of the State and courts in enforcing moral standards through law.

Lord Devlin, in his seminal work argued that society has the right to enforce shared moral values in order to preserve social cohesion.⁵⁰ According to him, marriage is not merely a private arrangement but a moral institution whose stability is essential for societal survival. Applied to PNAs, this would justify the judicial reluctance to enforce agreements that anticipate marital breakdown or commodify intimate relationships on the ground of public policy.

In contrast to this, HLA Hart strongly rejected this moralistic view, arguing the fact that conduct offends social morality is insufficient to justify legal coercion.⁵¹ In his view, private moral concerns between two consenting adults, even if viewed as distasteful or unconventional falls outside the domain of legal regulation. Thus, a PNA freely entered into by two parties do not harm society merely because they depart from traditional values.

Indian framework seems to be oscillating between these two ideas. While courts do normally adopt a *Devlin* like moral posture when striking down PNAs in Hindu law, they simultaneously recognise divorce, judicial separation and financial settlements under statutory frameworks such as the Hindu Marriage Act.⁵² This internal inconsistency weakens the prejudicial against the PNA.

Moreover, the Indian Supreme Court's evolving constitutional jurisprudence increasingly aligns with *Haritan* principles. Decisions recognising privacy, autonomy

50 Patrick Devlin, *The Enforcement of Morals* (1965).

51 H.L.A. Hart, *Law, Liberty and Morality* (1963).

52 See *Paige v. Sheonarain* (1946) 50 CWN 727; *Bataba Patil v. Padmarati*, AIR 1969 Ori 75.

and dignity as core constitutional values shift away from enforcing majoritarian morals.⁵³

Public policy must thus be understood not as a static repository of moral discomfort but as a dynamic concept shaped by constitutional values. Engaging with the Devlin-Hart debate therefore illuminates the deeper normative tensions underlying the judicial treatment of PNAs in India.

Socio-economic and cultural constraints on prenuptial agreements in India

Any analysis of the PNAs in India have to be situated within the unique socio economic and cultural landscape of the country. Unlike jurisdictions where marriage is increasingly understood as an individual and contractual arrangement, Indian marriages continue to be deeply embedded within familial and communal structures. These realities significantly shape both the resistance to and the potential utility of PNAs.

One of the most critical socio-economic factors influencing the Indian approach to the PNAs is gendered economic dependency. Despite increasingly workforce participation by women, marriage in India often results in disproportionate economic vulnerability for women.⁵⁴ Judicial reluctance to enforce PNAs is frequently justified as a proactive measure for women. However, this almost paternalistic concern assumes that all PNAs necessarily puts the woman at a disadvantage, overlooking the fact that a carefully drafted PNA may enhance the financial security by clearly stipulating maintenance, property rights and asset division.⁵⁵

Culturally marriages in India is rarely perceived as a private arrangement between two individuals, rather viewing it as a collective institution invoking extended families, social status and community honour. Thus, there is a cultural discomfort around PNAs especially in Hindu law where marriage is traditionally seen as a sacrament.

Socio economic stratification further complicates the discourse on PNAs. Among urban, economically independent couples, prenups are increasingly viewed as pragmatic tools for financial planning. In contrast, for large sections of Indian society where marriage remains a means to economic security and social mobility prenups are seen as destabilising instruments that could exacerbate existing inequalities. Additionally, the persistence of dowry, despite statutory prohibitions, underscores the paradox in Indian family law, while informal often exploitative financial negotiations surrounding marriages are socially tolerated.⁵⁶ Understanding these socio economic and cultural dimensions are essential to any reform oriented discussions on PNAs in India.

53 *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.; *Navej Singh Johar v. Union of India*, (2018) 10 SCC 1.

54 See National Family Health Survey (NFHS-5), Ministry of Health and Family Welfare (2021).

55 *Compare Bai Fatma v. Ali Mahomed Aiyab*, (1914) 16 Bom LR 641.

56 See Flavia Agnes, *Law and Gender Inequality* (Oxford Univ. Press 1999).

Child welfare as a limiting principle in the prenuptial landscape

Any discussion on the enforceability of PNAs must necessarily account for the rights and welfare of children. Across jurisdictions, a consistent principle emerges: while parties may contract freely with respect to thrown financial interests, they cannot predetermine or compromise the rights of a child through private agreements.

Under Indian law, the “best interest of the child” standard is firmly entrenched across statutory and judicial frameworks.⁵⁷ Custody, guardianship and maintenance are governed by statutes such as the Guardians and Wards Act, Hindu Minority and Guardianship Act and Section 125 of the CRPC.⁵⁸ Indian courts have consistently held that parental agreements cannot override the court’s obligation to independently assess the child’s welfare.

This judicial skepticism also explains the broad skepticism towards PNAs. Courts often conflate agreements regulating spousal financial arrangements with those that may potentially affect children, leading to a wholesale rejection of PNAs rather than a differentiated approach.⁵⁹ However, this conflation is not conceptually sound and a distinction must be drawn between provisions that exclusively govern inter spousal rights and those that purport to bind children.

Comparative practice often offers some guidance. In the US, both the Uniform Premarital Agreement Act (1983) and the Uniform Premarital and Marital Agreements Act (2012) expressly prohibit PNAs adversely affecting child support obligations. The Indian legal position already aligns with this approach in substance but the absence of a statutory framework for PNAs has prevented Indian courts from adopting a more nuanced stance that permits enforceability of spousal arrangements while ring-fencing child rights.

Consequences of improperly implemented prenuptial agreements

In the absence of a clear statutory framework governing PNAs in India, improperly drafted or executed contracts pose a challenge. Indian courts’ suspicion towards PNAs is informed less by opposition to contractual autonomy and more by concerns arising from unfair or coercive arrangements that surface during matrimonial disputes.⁶⁰

From a contractual standpoint, an improperly executed contract is vulnerable to several provisions of the Indian Contract Act. Agreements entered into without free

57 *Nil Ratan Kundu v. Abhijit Kundu*, (2008) 9 SCC 413 (India)

58 Guardians and Wards Act, No. 8 of 1890, §§ 7, 17 (India); Hindu Minority and Guardianship Act, No. 32 of 1956, § 13 (India); Code of Criminal Procedure, No. 2 of 1974, § 125 (India).

59 *Atbar Hussain v. Syed Siraj Ahmed*, (2010) 2 SCC 654 (India).

60 See generally *Tikait Mon Mohini Jemadai v. Basanta Kumar Singh*, (1901) 28 Cal 751 (PC); *Krishna Aiyar v. Balammal*, AIR 1914 Mad 351

consent, full disclosure or adequate understanding may invalidate the contract on grounds including coercion, undue influence or misrepresentation.⁶¹ Given the unequal bargaining power that often characterises Indian marriages such defects are far from hypothetical.

Ambiguity in drafting further compounds the problem. Vaguely worded causes relating to maintenance or residence invite inconsistent judicial interpretation leading to prolonged litigation.

V What Indian law needs to do before PNAs are a reality?

One of the most prominent arguments against the enforcement of PNAs is that such agreements are seen to contradict the traditional understanding of marriage in India. Given that personal laws continue to govern aspects of marriage, divorce and maintenance in India, it becomes increasingly complex to adopt a universal approach to PNAs. Under Hindu Law, for instance, marriage is traditionally seen as a sacrament rather than a contractual union. The Hindu Marriage Act (1950) explicitly recognises a marriage as valid when it has been solemnised according to the customary rites and ceremonies of either party to the marriage.⁶² One of the most common customs in this regard is the *Saptapadi*, or the taking of the seven sacred steps around the sacrificial fire, symbolising a bond that is intended to last seven lives.⁶³ In such a framework, the notion of incorporating a PNA appears incongruent, as it introduces the possibility of separation even before the marriage has begun.

However, to uncritically accept Hindu marriages are purely sacramental is to ignore the legal and judicial recognition of divorce within Hindu personal law. Hindu couples, do in fact, get divorced, and the Hindu Marriage Act does recognise grounds for divorce, judicial separation and divorce by mutual consent.⁶⁴ This directly refutes the claim that Hindu law is fundamentally averse to the dissolution of marriage. Moreover, no jurisdiction permits contractual arrangements that are contrary to public policy or that encourage divorce. Therefore, PNAs deal with matters arising post divorce such as maintenance, division of property and custody and should not be viewed as anti-marriage or as contrary to Hindu law principles.

The above argument has been framed primarily in the context of Hindu law, although it is worth noting that other personal systems in India, particularly the Islamic and

61 Indian Contract Act, 1872, ss. 13–19

62 *The Hindu Marriage Act*, 1955, s. 7: “A Hindu marriage may be solemnised in accordance with the customary rites and ceremonies of either party thereto.”

63 See *Mulla Hindu Law*, 23rd ed. (2021), where it is stated that the performance of *Saptapadi* is essential in most Hindu communities for the validity of a marriage.

64 The Hindu Marriage Act, 1955, ss. 13, 13A, and 13B lay down various grounds for divorce and provide for divorce by mutual consent.

Christian legal traditions, have historically allowed greater contractual flexibility in the context of marriage.⁶⁵ If the state chooses to recognise PNAs, it will become necessary for the legislature to enact a comprehensive and uniform legal framework similar to the Uniform Premarital Act in the US.⁶⁶ Such a framework should clearly define the permissible content of the PNA- whether it can contain sunset clauses, specify certain marital conduct as triggering divorce, place caps on maintenance or exclude certain matters altogether. Codifying these elements will bring fairness, transparency and certainty to PNAs. It would also assist courts in assessing their enforceability by providing a clear benchmark for review.

To move towards such a statutory framework, however the enactment of the Uniform Civil Code (UCC) is likely to be prerequisite. Without a UCC, applying a single set of principles to PNAs across personal law systems is quite unfeasible. The various conceptions of marriage - such as a sacrament, contract or covenant- would need to be harmonised into one uniform understanding. Only then can a single standard for PNAs be both feasible and effective. In the absence of the UCC, any attempt to regulate PNAs risks being partial, inconsistent and ultimately redundant.

VI Recent developments

In *Chatter Pal v. State* decided by the Delhi Family Court at Patiala House on May 16, 2023, the court went beyond merely adjudicating divorce dispute and recommended the idea of making PNAs mandatory in India.

In October 2023, a Family Court in Mumbai explicitly held that a PNA is not legally enforceable in India but it may be used by courts to understand the intention of the parties in a matrimonial dispute. The court allowed the document to be considered in the context of divorce proceedings and the allegations of cruelty, even though it did not treat the agreement as binding. This reflects a growing judicial willingness to consider prenups as evidentiary material even while maintaining that they do not override statutory rights such as maintenance or custodial entitlements.

It is also pertinent to note that the *Rajnesb* judgment which laid down comprehensive guidance on maintenance, harmonising different statutes and personal laws. This judgment illustrates the judiciary's evolving approach to final coal rights in marriage and divorce.

VII Conclusion

Recently, social media was hit by the sensational divorce of Yuzvinder Chahal (Indian cricketer) and Dhanashree Verma (YouTuber). The couple was highly popular and

65 See Flavia Agnes, *Family Law: Volume I: Family Law and Constitutional Claims* (OUP, 2011), which discusses the contractual and unilateral nature of marriage under Islamic law, including *nikabnamas*.

66 Multistate law enacted to enforce consistency in prenuptial agreements from state to state.

their divorce stoked much speculation with all their actions and movements being closely watched by fans, especially when Yuzvinder walked out of the family court wearing a shirt that said: *Be Your Own Sugar Daddy*. This hints at the high amounts that are stake in the form of alimony and maintenance in this divorce. Such distaste between the parties could easily be avoided in the presence of a prenup that is fair, transparent and certain.

This paper has traced the uncertain judicial and legislative landscape of prenuptial agreements in India. Despite the fact that contracts are generally enforceable under Indian Contract Act, the absence of specific statutory recognition for PNAs - combined with judicial discomfort rooted in notions of morality and public policy, renders them in a very grey area.

In contrast, jurisdictions in the US and UK have recognised the need to allow parties to pre define financial expectations, subject to safeguards like voluntariness, full disclosure and fairness. India need not blindly emulate these models but can certainly draw on them to develop a homegrown legal framework that respects both personal autonomy and the vulnerabilities inherent in the marriage.

A well drafted prenup is not cynical bet against marriage: it is a mature, realistic and responsible way of entering into a legal union. The time is ripe for India to move beyond moral anxieties and into a statutory regime for PNAs - one based on consent, clarity and certainty.

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