

A PAPER ON THE FEASIBILITY OF PRENUPTIAL AGREEMENTS IN INDIA

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Abstract

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

With divorce statistics all over the world on an increasing trend, it is becoming important to address the situation of the parties after the divorce. Prenuptial agreements over the world are becoming more and more common at a very fast rate, as newer generations are getting divorced at higher rates than their previous ones.

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

Introduction

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

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

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

Although the term prenup is relatively new and has come into usage mostly since the 1980s, the concept is not very new. In the Jewish religion a ketubah contract is which is signed by two witnesses while entering into a marriage which provides for the husband's legal obligation towards to his wife, and provides for her protection in the event of divorce or the death of her husband². The earliest ketubahs can be traced back to 440 BCE and have been found in ancient Egyptian papyrus scriptures.

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

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

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¹ Ortiz-Ospina, E. and Roser, M., 2020. Marriages And Divorces. [online] Our World in Data. Available at: <<https://ourworldindata.org/marriages-and-divorces>> [Accessed 4 September 2020].

² Solutions, E., 2020. What Is A Ketubah And Where Did It Come From? - Ketubah. [online] Ketubah. Available at: <<https://ketubah.com/blog/what-is-a-ketubah-and-where-did-it-come-from/>> [Accessed 4 September 2020].

³ Esposito, J., 2020. Mahr - Oxford Islamic Studies Online. [online] Oxfordislamicstudies.com. Available at: <<http://www.oxfordislamicstudies.com/article/opr/t125/e1390>> [Accessed 4 September 2020].

⁴ Encyclopedia.com. 2020. Mahr | Encyclopedia.Com. [online] Available at: <<https://www.encyclopedia.com/religion/encyclopedias-almanacs-transcripts-and-maps/mahr>> [Accessed 4 September 2020].

Countries where Prenups are Legal

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

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

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

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

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

In Canada, prenups or marriage contracts are enforceable. Although the country is administered provincially, all of the provinces recognize the prenuptial agreements but it is given different names in different provinces. For example, Ontario's Family Law Reform

⁵ Radmacher v Granatino [2010] UKSC 42

Act, 1978 authorizes marriage contracts. The agreements have to be written and signed in the presence of witnesses. These laws do not allow the spouses to opt out of making such an agreement. Canada's provincial laws allows only the court to set aside such an agreement if the nature or consequence is not understood by the parties, the degree of how much can be removed or disregarded or set aside differs from province to province. For example, Nova Scotia's law for non-enforcement of a prenup whereas British Columbia's laws allow the court to disregard a provision of the agreement and re-divide the assets on the basis of fairness.

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

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

⁶Web.archive.org. 2020. Wayback Machine. [online] Available at: <https://web.archive.org/web/20170828020040/https://www.iafl.com/cms_media/files/prenuptial_agreements_in_the_us.pdf> [Accessed 4 September 2020].

⁷Morley, J., 2020. PRENUPTIAL AGREEMENTS IN AUSTRALIA | The Law Office Of Jeremy D. Morley. [online] International-divorce.com. Available at: <<https://www.international-divorce.com/prenuptial-agreements-in-australia>> [Accessed 4 September 2020].

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

Religious Beliefs on Prenups

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

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

Islamic marriage itself is considered as a contract, which outlines the rights and responsibilities of the bride and the groom. The contract is known as *nikah-nama*. The contract is required to speak on aspects such as the place of dwelling of the couple, whether the husband would take a second or not, whether that requires the consent of the first wife or not etc. Another important part of marriage in Islam is the concept of providing a 'mahr' to the bride before the marriage. This mahr is like a gift which is provided as financial security of the wife in case of death of the husband or if the couple later on decide to separate. In case of a divorce, the wife might choose to give back the mahr or not. The mahr is given to either the bride or the father of bride.

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

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

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

Viability of Prenups in India

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

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

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

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

Since marriage is not looked as a contract therefore prenups are not a practice in the Hindu faith, yet there are not provisions of any law which can directly prohibit the usage of prenuptial agreements. Such agreements are not enforceable in India, except Goa, but with increasing trends of marriages ending up in divorce, it is looks like that they should be enforceable. As much as divorces are a worrying affair in Hindu marriages, the added-on worry about financial segregation only act detrimental to the whole affair.

In the case of Sunita Devendra Deshprabhu v. Sita Devi Deshprabhu⁸, the Bombay High Court took the prenuptial agreement into consideration while dividing assets between the erstwhile spouses. Therefore, just because they are not enforceable in India, per se, therefore it does not mean that they cannot be. In the example of the case the court did not directly enforce the prenuptial agreement but it took guidance from the agreement upholding the value of having one.

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

Conclusion and Suggestion

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

⁸ Sunita Devendra Deshprabhu v. Sita Devi Deshprabhu, 2019 SCC OnLine Bom 301

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

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

Financial stability is something which is sought by each and every human on the planet or it should be. Prenuptial agreements help in making sure that there is financial stability on part of both the parties after a marriage.

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

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