

# PRE-NUPTIAL AGREEMENTS IN INDIA: AN ANALYSIS OF LAW AND SOCIETY

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*Preuptial agreements are now being widely used across the world as effective instruments of delineating spousal rights in the course of subsistence of marriage as well as in the event of termination of marital relations. Yet the Indian State has demonstrated reluctance in attributing legal status to such instruments. The Indian position on prenuptial agreements can be described as uniquely ambiguous. On one hand, the nikahnama, a prenuptial agreement is recognised as an essential feature of Muslim marriages in India and the role of prenuptial agreements in determinations at the time of termination of Christian marriages is legally acknowledged. On the other hand, the enforcement of prenuptial agreements in relation to other religious communities has largely been dependent on judicial interpretation. Noticeably, in recent discussions concerning prenuptial agreements in India, societal perspectives have taken up a dominant role, in fact to the extent of overshadowing perspectives of the key stakeholders in the matter. In this paper, therefore, we endeavour to shift the focus back onto the key stakeholders by assessing the potential benefit that prenuptial agreements can have for couples in India and delineating the models of such agreements which prospective spouses can consider adopting for managing their marital relations.*

## Table of Contents

<b>I.</b>	<b>INTRODUCTION</b> .....	<b>3</b>
<b>II.</b>	<b>AN OVERVIEW OF PRENUPTIAL AGREEMENTS IN INDIA</b> .....	<b>4</b>
	<b>A. THE PUBLIC POLICY VIEW OF PRENUPTIAL AGREEMENTS</b> .....	<b>5</b>
	<b>B. JUDICIAL PERSPECTIVES ON PRENUPTIAL AGREEMENTS</b> .....	<b>9</b>
	<b>1. Prenuptial agreements in Hindu marriages</b> .....	<b>9</b>
	<b>1.1. Invalid prenuptial agreements</b> .....	<b>9</b>
	<b>1.2. Valid prenuptial agreements</b> .....	<b>11</b>
	<b>2. Prenuptial agreements in Muslim marriages</b> .....	<b>12</b>
	<b>1.1. Invalid prenuptial agreements</b> .....	<b>12</b>
	<b>1.2. Valid prenuptial agreements</b> .....	<b>13</b>
	<b>C. PRENUPTIAL AGREEMENTS IN OTHER COMMUNITIES IN INDIA</b> .....	<b>15</b>
	<b>D. PUBLIC RECEPTION TOWARDS PRENUPTIAL AGREEMENTS</b> .....	<b>16</b>
<b>III.</b>	<b>ADDRESSING RESISTANCE TO PRENUPTIAL AGREEMENTS</b> .....	<b>17</b>

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A. *ON THE EFFECT ON THE SANCTITY OF MARRIAGE*..... 17

B. *ON THE POTENTIAL OF MISUSE OF EMOTIONAL AFFINITY*..... 18

C. *ON THE POSSIBILITY OF EXPLOITATION OF VULNERABLE WOMEN* ..... 20

D. *ON PUBLIC POLICY CONCERNS* ..... 21

IV. *THE STATUS OF PRENUPTIAL AGREEMENTS: A GLOBAL OVERVIEW* ..... 22

A. *PRENUPTIAL AGREEMENTS IN ENGLAND*..... 23

B. *PRENUPTIAL AGREEMENTS IN THE UNITED STATES OF AMERICA*..... 27

C. *PRENUPTIAL AGREEMENTS IN CANADA* ..... 30

D. *PRENUPTIAL AGREEMENTS IN CHINA*..... 33

E. *PRENUPTIAL AGREEMENTS IN TURKEY*..... 35

V. *CONCEPTUALISING MODEL PRENUPTIAL AGREEMENTS FOR INDIA* ..... 37

A. *VIEWING THE NIKAHNAMA AS AN INSTRUMENT FOR THE BENEFIT OF MUSLIM WOMEN*..... 39

1. *Suggested clauses for a model nikahnama*..... 41

1.1. *A ‘no polygamy’ clause* ..... 42

1.2. *Expressly negating the need of nikah halala* ..... 43

1.3. *Clause determining and guaranteeing mehr in addition to maintenance* ..... 44

1.4. *Determination of maintenance payable after iddat period*..... 45

1.5. *Clause prohibiting nikah mut’ah*..... 46

1.6. *Delineating irretrievable breakdown of marriage as a ground for divorce*..... 47

1.7. *Allowing for resisting restitution of conjugal rights under specific circumstances* 48

1.8. *Delegation of right to divorce to the wife*..... 49

B. *POTENTIAL CLAUSES FOR A PAN-INDIA MODEL OF PRENUPTIAL AGREEMENT* ..  
..... 50

1. *Clauses related to assets* ..... 51

2. *Clauses related to children*..... 54

3. *Clauses related to spousal rights and duties*..... 55

4. *Lifestyle clauses* ..... 57

5. *Operational clauses* ..... 59

VI. *CONCLUSION*..... 59

## I. INTRODUCTION

Prenuptial agreements are gradually gaining popularity among young couples, who are seeking to protect their assets and attempting to negotiate the best deal for each of them in case of a possible end to their marital bond.<sup>1</sup> While the rising rates of divorce are understood to be a factor influencing couples to sign prenuptial agreements,<sup>2</sup> the changing attitude towards marriage and the increase in independence of women<sup>3</sup> can also be viewed as responsible for the rising acceptance and use of prenuptial agreements.

While the use of such agreements continues to grow in Western countries,<sup>4</sup> Indian couples seeking to follow this development often face a difficult situation owing to the fact that the law regarding prenuptial agreements is still at a nascent stage in India.<sup>5</sup> While the benefits of prenuptial agreements are manifold,<sup>6</sup> in light of the inaction of legislators with respect to the formulation of relevant laws or policies and the uncertainty in terms of the judicial stance towards prenuptial agreements, the validity of prenuptial agreements in India remains a question without a clear answer.

In this paper, we shall attempt to address the problem of ambiguity surrounding prenuptial agreements in India and provide some model clauses of such agreements which may be capable of being implemented while taking into account the diversity of personal laws governing matters of marriage and divorce in the country. In pursuance of the same, Part II shall highlight the judicial stance projected by different high courts and the Supreme Court in relation to prenuptial agreements. The section shall analyse various cases in an effort to compare and contrast the viewpoints put forth by different courts and deduce emerging trends with respect to the treatment of prenuptial agreements in India.

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<sup>1</sup> *Prenuptial Agreements Are on the Rise, and More Women are Requesting Them*, HUFFINGTON POST, October 22, 2013, available at [https://www.huffingtonpost.com/2013/10/22/prenups-\\_n\\_4145551.html](https://www.huffingtonpost.com/2013/10/22/prenups-_n_4145551.html) (Last visited on June 3, 2019).

<sup>2</sup> *Why are prenuptial agreements becoming so popular?*, WINSTON SOLICITORS LLP, September 17, 2015, available at <https://www.winstonsolicitors.co.uk/blog/why-are-prenuptial-agreements-becoming-so-popular.html> (Last visited on June 3, 2019); Arlene Dubin & Rebecca A. Provder, *Current Trends in a Growth Area: Prenuptial Agreements*, MOSES & SINGER LLP, July 30, 2012, available at <https://www.mosessinger.com/uploads/currenttrendsgrowthareaprenupagreements.pdf> (Last visited on June 3, 2019).

<sup>3</sup> *Why prenuptial agreements are more popular today*, TORRES LAW, P.C, August 23, 2017, available at <http://www.tlghouston.com/blog/2017/08/why-prenuptial-agreements-are-more-popular-today.shtml> (Last visited on June 3, 2019); Hillary Hoffower, *Prenups aren't just for the rich or famous—more millennials are signing them before getting married, and you probably should too*, BUSINESS INSIDER, September 30, 2018, available at <https://www.businessinsider.in/personal-finance/prenups-arent-just-for-the-rich-or-famous-more-millennials-are-signing-them-before-getting-married-and-you-probably-should-too/articleshow/66018811.cms> (Last visited on June 6, 2019).

<sup>4</sup> American Academy of Matrimonial Lawyers, *Prenuptial Agreements on the Rise finds Survey*, October 26, 2017, available at <http://aaml.org/about-the-academy/press/press-releases/prenuptial-agreements-rise-finds-survey> (Last visited on June 7, 2019).

<sup>5</sup> Aarefa Johari, *Is India really ready for prenuptial agreements, ask divorce lawyers*, SCROLL. IN, November 20, 2015, available at <https://scroll.in/article/770445/is-india-really-ready-for-prenuptial-agreements-ask-divorce-lawyers> (Last visited on June 7, 2019).

<sup>6</sup> See Mela Garber, *Why You May Need A Prenup*, ANCHIN PRIVATE CLIENT, available at [https://www.anchin.com/uploads/1413/doc/APC-News\\_042016\\_Prenup.pdf](https://www.anchin.com/uploads/1413/doc/APC-News_042016_Prenup.pdf) (Last visited on June 7, 2019).

Thereafter, recognising the criticisms that prenuptial agreements may face from a societal perspective, we put forth our rebuttals to some criticisms which may be raised against prenuptial agreements in Part III. In Part IV, we look at different models pertaining to prenuptial agreements which have been adopted in different foreign nations, with a view to understanding the nature of prenuptial agreements which have been considered viable across the world. Based on the experiences of Indian society and learning from the practices around the world, we present two sets of clauses in Part V— one set of which in our opinion shall be befitting of a model *nikahnama* while the other set can be used in prenuptial agreements on a pan India basis. The final part contains our concluding remarks where we comment on our vision of the implementation of prenuptial agreements in the Indian context.

## II. AN OVERVIEW OF PRENUPTIAL AGREEMENTS IN INDIA

The accelerated progress of Indian society has resulted in the emergence of several unique social issues which have been sought to be addressed through the prolific interpretation of constitutional basic guarantees in the post Emergency era, which has also assisted in making the judicial process more accessible and participatory.<sup>7</sup> The Indian judiciary has principally acknowledged time and again many such developments in Indian society through their acceptance and accommodation in different judgments.<sup>8</sup> Eventually in many cases, this has also inspired law makers to draft necessary statutes. The results of such social and judicial activism, to name a few, are Protection of Women from Domestic Violence Act, 2005, perceiving the percept of domestic violence in a family, judicial interpretation of Muslim Woman (Protection of Right on Divorce) Act, 1986, justifying the right to receive alimony even after *iddat* period by divorced Muslim women,<sup>9</sup> and the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

This progression in the legislative arena coupled with the opening up of new economic avenues has arguably helped to empower Indian women. More and more women are now economically independent with deeper self-realisation of inner strength and are thus, empowered with the capability to walk out of a bad marriage.<sup>10</sup> There has traditionally been a social stigma associated with divorce, with female spouses being typically blamed for it.<sup>11</sup> However, the rapid modernisation of Indian society has arguably meant that women are now more prone to rebel against regressive ethos, which is demonstrated with more women seeking for the roles of homemaker and provider to be shared between husband and wife in a marital set-up.<sup>12</sup>

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<sup>7</sup> S. P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J. L. & POL'Y 51 (2001); Werner Menski, *The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda*, 9(3) GERMAN LAW JOURNAL 213, 214 (2008).

<sup>8</sup> See *Shayara Bano v. Union of India*, (2017) 9 SCC 1; *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1; *Indian Young Lawyers Association v. State of Kerala*, 2016 SCCOnline SC 1783.

<sup>9</sup> *Danial Latifi v. Union of India*, (2001) 7 SCC 740.

<sup>10</sup> See Indrani Basu, *What do Modern, Financially-Independent Indian Women look for in a Marriage?*, HUFF POST (March 3, 2016), available at [https://www.huffingtonpost.in/2016/03/08/indian-women-marriage\\_n\\_9401650.html](https://www.huffingtonpost.in/2016/03/08/indian-women-marriage_n_9401650.html) (Last visited on June 5, 2019).

<sup>11</sup> Paul R. Amato, *The Impact of Divorce on Men and Women in India and United States*, 25 J. COMP. FAMILY STUDIES 207, 209 (1994).

<sup>12</sup> Reeta Sonawat, *Understanding Families in India: A Reflection of Societal Changes*, 17(2) TEORIA E PESQUISA (2001).

Modernisation, educational and financial empowerment of women alongside changing notions of marriage<sup>13</sup> have together contributed towards the dilution of the stigma encircling divorce.<sup>14</sup> This empowerment of women coupled with the emergence of *Mahila Panchayats*<sup>15</sup> or ‘All Women Alternative Courts’ have provided women with greater opportunity to voice their grievances related to their marital lives.<sup>16</sup> This has resulted in rapid increase in divorce rate from 1 in 1000 ten years ago to about 13 in 1000 presently.<sup>17</sup> It is worth noting though that initiation of divorce proceedings is higher among women belonging to socio-economic classes which appear to have better access to legal recourse than others. As found by Hasina Khan, founder of the Bebaak Collective, a Muslim women’s organisation based in Mumbai, one important reason for the low divorce rate among Muslim women (23.3 per cent against 68 per cent as per 2011 Census) has been the State’s deficiency to empower Muslim women.<sup>18</sup>

Due to the emotional and financial implications involved, divorces have the potential to embroil spouses in courtroom battles over prolonged periods, bargaining on issues such as distribution of assets, maintenance and child custody,<sup>19</sup> leading to loss of both money and time. Though not intended at the time of forging a marital bond, termination of marriage is a likely possibility in modern times which should be given due regard by couples intending to get married. In this regard, prenuptial agreements can be of immense assistance for planning ahead for such an eventuality, if it were to unfortunately arise, with negotiated terms clearly delineating the obligations of the spouses both during the marital period and post termination of marriage.<sup>20</sup>

#### A. THE PUBLIC POLICY VIEW OF PRENUPTIAL AGREEMENTS

Prenuptial agreements, though not specifically regulated under provisions of Indian personal laws, have evidently been a fixture in Indian society since long.<sup>21</sup> Within the

<sup>13</sup> Shephali Bhatt, *Happily divorced: Indian women are breaking the stigma around separation like never before*, THE ECONOMIC TIMES PANACHE, January 27, 2019, available at <https://economictimes.indiatimes.com/magazines/panache/happily-divorced-indian-women-are-breaking-the-stigma-around-separation-like-never-before/articleshow/67704287.cms?from=mdr> (Last visited on June 5, 2019).

<sup>14</sup> Anand Giridharadas, *With India’s New Affluence Comes the Divorce Generation*, N. Y. TIMES, Feb 19, 2008, available at <http://www.nytimes.com/2008/02/19/world/asia/19iht-divorce.110178712.html> (Last visited on June 10, 2019).

<sup>15</sup> *Action India—Mahila Panchayat Program*, available at <http://actionindiaworld.org/pages/programs-campaigns/women-law-and-social-change/mahila-panchayat-program.php> (Last visited on June 12, 2019). Although the decisions of the *Mahila Panchayat* are not legally binding, the community members who take part in these alternative courts help to give effect to the decisions.

<sup>16</sup> Sylvia Vatak, *The “women’s court” in India: an alternative dispute resolution body for women in distress*, 45(1) THE JOURNAL OF LEGAL PLURALISM AND UNOFFICIAL LAW (2013).

<sup>17</sup> *Divorce Rate in India Increasing*, January 9, 2017, available at <http://marriagelane.com/divorce-rate-in-india-increasing/> (Last visited on June 14, 2019).

<sup>18</sup> Alison Saldanha, *Nearly 80% of divorced Indian Muslims are women, shows Census 2011 data*, FIRST POST, October 15, 2016, available at <http://www.firstpost.com/india/nearly-80-of-divorced-indian-muslims-are-women-shows-census-2011-data-3053332.html> (Last visited on June 15, 2019).

<sup>19</sup> Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88(5) YALE LAW JOURNAL 950-997 (1979).

<sup>20</sup> Vijender Kumar, *Matrimonial Property Law in India: Need of the Hour*, 57 JILI (2015) 500.

<sup>21</sup> *Hamidunnessa Biwi v. Zohiruddin Sheikh*, (1890) 17 Cal 670; *Khatun Bibi v. Rajja*, AIR 1926 All 615; *Tekait Mon Mohini Jemadai v. Basant Kumar Singh*, (1901) 23 Cal 751; *Krishan Iyer v. Ballamal*, (1911) 34 Mad 398. In these pre-independence cases, courts did to accord validity to the prenuptial agreements. However, in other cases

legislative domain, §40 of the Divorce Act, 1869, applicable to dissolution of Christian marriages, specifically provides that district courts may look into the existence of prenuptial agreements and refer to terms contained therein while passing a decree on the settlement of property upon divorce. On the other hand, acceptance of prenuptial agreements in the context of Hindu marriages has not as seamless, given that marriage among Hindus is treated as a religious bond rather than a contract.<sup>22</sup>

A prenuptial agreement due to its contractual character,<sup>23</sup> in the absence of specific regulating provisions under Indian personal laws, could arguably be governed by provisions of the Indian Contract Act, 1872.<sup>24</sup> It is therefore, not surprising that courts have generally preferred to declare prenuptial agreements as void on account of being against public policy.<sup>25</sup> This tendency of courts has been specifically demonstrated against prenuptial agreements which in the view of the courts appeared to promote separation or sought to alter the tenets of the personal law on the matter of marriage. The implications of such contractual character of prenuptial agreements have been discussed in later in this paper.

Given the resistance towards accepting prenuptial agreements, particularly due to the religious stance of the Hindu religion towards marriage, we submit that prenuptial agreements should not by themselves be conceived as offensive to the religious notion associated with marriage. In fact, it is interesting to note that the *Ketubah* marriage contract intrinsic to marriage under the Jewish religion, where written commitments are given by the groom before nuptials to provide economic safeguards to the wife in case of his death or divorce, is also a type of prenuptial agreement.<sup>26</sup> Further, prenuptial agreements are also commonplace to marriages under Islam, which regards marriage as a civil contract.<sup>27</sup> Prenuptial contractual conditions related to Muslim marriage may include any condition that is allowed under Islamic law,

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before independence like *Banne Saheb v. Abida Begum*, AIR 1922 Oudh 251; *Mahmud Ali v. Ghulam Fatima*, AIR 1935 Lah 902; *Nawab Khwaja Md. Khan v. Nawab Husaini Begam*, (1910) 12 BomLR 638, the courts upheld the prenuptial agreements.

<sup>22</sup> *Are prenuptial agreements valid and enforceable in India?*, THE ECONOMIC TIMES, October 13, 2014, available at <https://economictimes.indiatimes.com/analysis/are-prenuptial-agreements-valid-and-enforceable-in-india/articleshow/44782040.cms?from=mdr> (Last visited on June 9, 2019).

<sup>23</sup> *But see* Divyanashi Chandra, *Band, Baajaa, 'bargain': Legal Status of Pre-nuptial Agreements in India*, MANUPATRA, available at <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=e42868ef-4b1d-43cb-ade4-720680f59c6e&txtsearch=Subject:%20Family%20Law> (Last visited on June 11, 2019) (The author suggests that a prenuptial agreement may be regarded as merely a memorandum of understanding between two individuals and thus, not overtly binding).

<sup>24</sup> Indian Contract Act, 1872, §10 states that “All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void”; Indian Contract Act, 1872, § 23 states that “The consideration or object of an agreement is lawful, unless ... the Court regards it as ... opposed to public policy”.

<sup>25</sup> *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh* (1901) ILR 28 Cal 751; *Krishna Aiyar v. Balammal* (1911) ILR 34 Mad 398.

<sup>26</sup> Abbot Downing, *A Thoughtful Approach to Prenuptial Agreements*, available at [https://www.abbotdowning.com/\\_asset/630bk4/A-Thoughtful-Approach-to-Prenuptial-Agreements.pdf](https://www.abbotdowning.com/_asset/630bk4/A-Thoughtful-Approach-to-Prenuptial-Agreements.pdf) (Last visited on June 10, 2019); *see* Batya Medad, *The Ketubah as a Prenup*, JEWISH PRESS, available at <https://www.jewishpress.com/blogs/shiloh-musings/the-ketubah-as-a-prenup/2013/02/10/> (Last visited on June 10, 2019).

<sup>27</sup> Justice (Retd.) S.A. Kader, *Dissolution of Muslim Marriage and Remarriage of the Divorced Couple*, (2004) 1 LW (JS) 41; Narendra Kumar Verma, *Nikaah as a “Civil Contract” in Muslims*, 15(1) RESEARCH LINK (2016).

provided that it is agreed upon by both parties.<sup>28</sup> Agreement to pay *Mahr Mu'ajjal* or *Mu'akhkhar*, which is to be paid to the wife after separation or death of the husband, is a well known example of a term of Muslim prenuptial agreements.<sup>29</sup>

Nevertheless, it is important to keep in mind that an agreement whose object or consideration is against public policy is invalid in contractual terms.<sup>30</sup> It is thus, important to reflect on the fact that certain judicial holdings have over time pronounced several prenuptial agreements as being void on account of being against public policy, some of which are discussed in this section.<sup>31</sup>

In the case of *Tekait Man Mohini Jemadi v. Basanta Kumar Singh*,<sup>32</sup> the Calcutta High Court found a prenuptial agreement providing that the husband would never take his wife away from her mother's house and would follow the instructions of the wife's mother at all times to be void on the ground of public policy. Similarly, a prenuptial agreement requiring the husband to perpetually reside in his wife's house was held to be against public policy by the Allahabad High Court since it was viewed to constitute a restriction on the liberty of the husband.<sup>33</sup>

So also, a prenuptial agreement providing for payment of a fixed amount of money to the wife in case of her choosing to leave her husband for whatsoever reason was held to be against public policy by the Madras High Court in *Krishna Aiyar v. Balammal*.<sup>34</sup> Further, the Bombay High Court in *Bai Fatima v. Ali Mahomed Aiyab*<sup>35</sup> held that a prenuptial agreement specifying maintenance for wife in the event of prospective separation, although entered into by a Mahommedan couple, was against public policy since the agreement encouraged separation in addition to providing for it. Public policy was also cited by the Jammu and Kashmir High Court in one instance to hold a prenuptial agreement providing that the husband would live like a servant in the house of his father-in-law to be unenforceable.<sup>36</sup>

At the same time, it is to be noted that in *Bai Appibai v. Khimji Cooverji*,<sup>37</sup> a prenuptial agreement requiring the couple to reside in Bombay after marriage was held by the Bombay High Court as not being against public policy, given that it did not impose a restrictive obligation on either spouse to reside in Bombay permanently. Further, another prenuptial agreement between the couple providing that the wife would be given ornaments if she married the husband, though unenforceable due to uncertainty, was not found to be against public policy. In fact, the Bombay High Court in the case opined that a prenuptial agreement followed by

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<sup>28</sup> Abdul Moin v. Mst. Rafia Bano, Court of Civil Judge, Tis Hazari Court, New Delhi, Suit No. 125/2012 (March 13, 2014).

<sup>29</sup> VINCENT J. CORNELL, VOICES OF ISLAM: VOICES OF LIFE : FAMILY, HOME, AND SOCIETY, Vol. III, 66 (2007); Brian H. Bix, *Mahr Agreements: Contracting in the Shadow of Family Law (and Religious Law)—A Comment on Oman's Article*, 61(1) WAKE FOREST L. REV. COMMON L. (2011).

<sup>30</sup> Indian Contract Act, 1872, §§10, 23 (India).

<sup>31</sup> For more detailed case law discussion, *infra* Part II (B) of this paper.

<sup>32</sup> *Tekait Man Mohini Jemadi v. Basanta Kumar Singh*, (1901) ILR 28 Cal 751.

<sup>33</sup> *Khatun Bibi v. Rajjab*, AIR 1926 All 615.

<sup>34</sup> *Krishna Aiyar v. Balammal*, (1911) ILR 34 Mad 398.

<sup>35</sup> *Bai Fatima v. Ali Mahomed Aiyab*, ILR 1913 37 Bom 280.

<sup>36</sup> *Mst. Jani v. Mohd. Khan*, AIR 1970 J&K 154.

<sup>37</sup> *Bai Appibai v. Khimji Cooverji*, AIR 1936 Bom 138.

marriage is valid and enforceable, with marriage constituting the consideration for the agreement.<sup>38</sup>

In another instance, a prenuptial agreement providing for separate maintenance for a Mohammedan wife was held by the Calcutta High Court as not opposed to public policy.<sup>39</sup> Similarly, a prenuptial agreement providing for maintenance for the wife in case of future separation was not hit by public policy as per the decision of the Allahabad High Court.<sup>40</sup> An agreement requiring payment of specified amount for leaving the house of the father-in-law and providing for operation of divorce in case of failure to pay the amount was also held to not be against public policy by the Jammu and Kashmir High Court.<sup>41</sup>

Given these viewpoints presented by Indian courts regarding the possibility of conflict of prenuptial agreements with public policy, it becomes important to briefly consider what the idea of ‘public policy’ entails. According to Lord Atkin, one of the most eminent judges of the last century, the doctrine of public policy “should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds”.<sup>42</sup>

In the notable case of *ONGC Ltd. v. Saw Pipes Ltd.*,<sup>43</sup> the Supreme Court of India observed that there is no precise definition of ‘public policy’ as it varies from “generation to generation and from time to time” and therefore, the idea of ‘public policy’ is ambiguous and its “narrow or wider meaning” depends on the situation in which it is applied. In reaching this conclusion, the Hon’ble Apex Court referred to the case of *Central Inland Water Transport Corporation Limited v. Brojo Nath Ganguly*,<sup>44</sup> where it was held that “(t)he concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time”. Resultantly, the new concept of ‘public policy’ takes the place of old one and what was considered once against ‘public policy’ may be upheld by the court today and *vice versa*. Further, the Supreme Court also relied on the dictum Lord Davey in *Janson v. Driefontein Consolidated Gold Mines Ltd.*<sup>45</sup> stating that “(p)ublic policy is always an unsafe and treacherous ground for legal decision”.

Additionally, Justice Reddy of the Andhra Pradesh High Court in *Ratanchand Hirachand v. Askar Nawaz Jung*<sup>46</sup> observed that promotion of public good and prevention of public damage are the touchstones of ‘public policy’ and judges should take decisions on this issue not as a legal luminary but as an “experienced and enlightened” member of the community.

Looking to the West, the landmark judgment of the Supreme Court of the United Kingdom in *Radmacher v. Granatino*<sup>47</sup> (‘Radmacher’) updated the ‘public policy’ position on

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<sup>38</sup> *Id.*, ¶20.

<sup>39</sup> *Abbas Ali v. Nazemunnessa Begum*, 43 CWN 1059.

<sup>40</sup> *Muhammad Muinud Din v. Musammat Jamal Fatima*, AIR 1921 All 152.

<sup>41</sup> *Mohd Khan v. Shahmali*, AIR 1972 J&K 8.

<sup>42</sup> *Fender v. St John Mildmay*, (1938) AC 1.

<sup>43</sup> *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705.

<sup>44</sup> *Central Inland Water Transport corporation Limited v. Brojo Nath Ganguly*, (1986) IILJ 171 SC.

<sup>45</sup> *Janson v. Driefontein Consolidated Gold Mines Ltd.*, (1902) AC 484, 500.

<sup>46</sup> *Ratanchand Hirachand v. Askar Nawaz Jung*, AIR 1976 AP 112.

<sup>47</sup> *Radmacher v. Granatino*, (2010) UKSC 42.

prenuptial and postnuptial agreements, holding that prenuptial agreements do not clash with the ‘public policy’ as long as they are jointly and willingly assented to and should therefore be enforced unless it would result in unfairness to either of the parties. Unfortunately, the position in India on the enforceability of prenuptial agreements, as demonstrated by the above discussion, is not as clearly demarcated.

## B. JUDICIAL PERSPECTIVES ON PRENUPTIAL AGREEMENTS

Hence, we review the important cases with regard to two key religious communities—those related to Hindu personal law followed by cases concerned with Mohammedan personal law, in an attempt to discern possible patterns in the interpretations made by the courts.

### 1. Prenuptial agreements in Hindu marriages

Case laws indicate there have been various instances where cases involving prenuptial agreements entered into in the context of Hindu marriages have come forth for interpretation before Indian courts. The trend in judicial interpretation in relation to such agreements is worth observing.

#### 1.1. Invalid prenuptial agreements

In *Sheonarain v. Paigi* (‘Sheonarain’),<sup>48</sup> the plaintiff husband, prior to his marriage, entered into a prenuptial agreement wherein he agreed to settle in his mother-in-law’s house with his wife. However, he subsequently left the house, refused to return to the house and began living with a Muslim woman who he had taken as his mistress. Thereafter, he filed a suit for restitution of conjugal rights. In its verdict concerning the appeal from the defendant wife, the Allahabad High Court permitted the plaintiff to enjoy conjugal rights after “restoration to his caste” and ordered the defendant to return to her husband within one month of such restoration.<sup>49</sup> It is worth noting that in this case, a plea taken by the defendant wife that the plaintiff husband had acted in contravention to their prenuptial agreement, based on which she had agreed to marry him, and hence he was not allowed to enforce his conjugal rights, was not entertained by the High Court and in fact seen as “absurd”.<sup>50</sup>

In *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh*,<sup>51</sup> (‘Mon Mohini’) the parents of the husband and the husband himself signed a pre-marriage agreement when he was a minor stating that he would reside in the house of his mother-in-law and would abide by the instructions of his mother-in-law. Yet, after living for about 15 years as such, the husband left his mother-in-law’s residence on account of the arising of some differences and demanded that his wife reside with him in his residence. The Calcutta High Court relied on the Sheonarain case and some foreign judgements<sup>52</sup> to hold that this pre-marital agreement was opposed to public policy as it was meant to permanently control the rights of the husband granted by the Hindu law, which

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<sup>48</sup> *Sheonarain v. Paigi*, (1885) ILR 8 All 78.

<sup>49</sup> *Id.*, ¶9.

<sup>50</sup> *Id.*, ¶3.

<sup>51</sup> *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh*, (1901) ILR 28 Cal 751.

<sup>52</sup> *Wilson v. Wilson*, (1864) 1 H.L.C. 538; *Merryweather v. Jones*, (1868) 4 Giff. 509.

as per the court could instigate future separation of the couple. The Court thus, declared the prenuptial agreement to be invalid.<sup>53</sup>

In the case of *Krishna Aiyar v. Balammal*<sup>54</sup> ('Krishna Aiyar'), a petition was filed by the husband for restitution of marital rights. Shortly after filing the suit, the couple compromised to stay together and the husband then promised to pay some alimony to the wife in the event of future separation. However, the wife never returned to conjugal life after the agreement. Thus, the agreement was not prenuptial. Nonetheless, it is worth noting that the Madras High Court referred to the Mon Mohini case and declared the agreement in question to be void stating that it was against the marital obligation under Hindu law.<sup>55</sup> The court also held that the agreement was against public policy as future separation was envisaged in the agreement.

In *Thirumal Naidu v. Rajammal Alias Rajalakshmi*,<sup>56</sup> the question before the Madras High Court was whether a prenuptial agreement between a husband and a wife to live separately would go against the claim for restitution of conjugal rights made the wife. The court placed reliance on the Krishna Aiyar case and opined that as marriage under Hindu law is not merely a contract but is sacramental in nature, a prenuptial agreement for future separation is contrary to the public policy and therefore, invalid.<sup>57</sup>

The case of *Sribataha Barik v. Musamat Padma*<sup>58</sup> involved a revision petition in the Orissa High Court against the order passed by the sub-divisional magistrate to pay the wife a monthly sum of INR 40 for the maintenance of herself and her child. In this case, there was a pre-marital agreement that the husband would stay with the wife in her residence, but after a few years of residence the husband left his in-law's house, though he continued to stay in the same village with his mother separately. He also invited his wife and the child to stay with him and his mother. The court referring the Mon Mohini case observed that the wife must stay with the husband as per rule of the Hindu law and the prenuptial agreement was invalid as it was opposed the public policy.<sup>59</sup>

As established earlier, public policy has been the recurring concern of Indian courts in refusing to give effect to prenuptial agreements. From a study of the aforementioned cases, the implementation of the public policy argument in invalidating prenuptial agreements has ostensibly taken shape in two distinct ways. Firstly, prenuptial agreements with clauses seeking to override rights and entitlements provided under Hindu personal law and tradition have been struck down on public policy grounds. Secondly, prenuptial agreements with clauses which are perceived by the court as having the potential to encourage future separation of the married couple have also been interpreted as being against public policy.

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<sup>53</sup> Tekait Mon Mohini Jemadai v. Basanta Kumar Singh, (1901) ILR 28 Cal 751, ¶¶39,44.

<sup>54</sup> Krishna Aiyar v. Balammal, (1911) ILR 34 Mad 398.

<sup>55</sup> *Id.*, ¶2.

<sup>56</sup> Thirumal Naidu v. Rajammal Alias Rajalakshmi, (1967) 2 MLJ 484.

<sup>57</sup> *Id.*, ¶¶8-9.

<sup>58</sup> Sribataha Barik v. Musamat Padma, AIR 1969 Ori 112.

<sup>59</sup> *Id.*, ¶¶5, 6, 8.

## 1.2. Valid prenuptial agreements

Although there exists a body of Indian case law opposing the validity of prenuptial agreements in the context of Hindu marriages, it is worth noting that there are also some cases which have sought to accord validity to prenuptial agreements.

In *Pran Mohan Das v. Hari Mohan Das*,<sup>60</sup> a person agreed to marry a woman based on the promise of her father to gift a house to his daughter. After the marriage, the plaintiff father shifted the possession of the house through unregistered gift. The couple maintained possession of the house for several years and sold it to some other persons. The wife's father later sued to recover the house. Here, the Calcutta High Court held that the prenuptial agreement was good and valid and the principle of "part-performance of a contract" estopped the plaintiff from recovery of the property.<sup>61</sup> Moreover, as the agreement in question was not a marriage brokerage contract, it was not found to be opposed to public policy.<sup>62</sup>

Further, in *Commissioner of Income Tax v. Mansukhrai More*,<sup>63</sup> the High Court of Calcutta held that the transfer of property as per prenuptial agreement for the accomplishment of commitments undertaken was justified and did not attract §16(3) of the Indian Income Tax Act, 1922. In *Sunita Devendra Deshprabhu v. Sitadevi Deshprabhu*,<sup>64</sup> the prenuptial agreement was among the documents considered while deciding on a dispute regarding separation of assets.

In other case, the High Court of Bombay in *Bai Appibai v. Khimji Cooverji*<sup>65</sup> sought to take a balanced view on prenuptial agreements, holding that the dictum in the Mon Mohini case and the Krishna Aiyar case would not be valid where the husband had abandoned the wife and it would also not attract the issue of public policy violation.<sup>66</sup> It was observed that although Hindu law had made the husband tantamount to a 'deity' or 'god' for the wife, this would not allow a husband to desert his wife, deny the marriage or ignore her.<sup>67</sup> The court further stated that as per the prenuptial agreement, the wife should be granted the requested relief of separate maintenance and residence as long as there was no confusion about her chastity. However, the Court did not give any verdict in favour of the wife receiving ornaments, which was the subject matter of another prenuptial agreement, from the defendant husband due to lack of certainty.<sup>68</sup>

In this context, a brief discussion of *Sandhya Chatterjee v. Salil Chandra Chatterjee*,<sup>69</sup> though it concerns a post-nuptial agreement, would be relevant towards understanding how a logical contractual agreement between the husband and wife will not be opposed to public policy and enforceable. In this case, the Calcutta High Court while referring to

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<sup>60</sup> *Pran Mohan Das v. Hari Mohan Das*, AIR 1925 Cal 856.

<sup>61</sup> *Id.*, ¶5, 9.

<sup>62</sup> *Id.*, ¶8.

<sup>63</sup> *Commissioner of Income Tax v. Mansukhrai More*, (1988) 174 ITR 703 (Cal).

<sup>64</sup> *Sunita Devendra Deshprabhu v. Sitadevi Deshprabhu*, 2016(6) BomCR 567.

<sup>65</sup> *Bai Appibai v. Khimji Cooverji*, AIR 1936 Bom 138.

<sup>66</sup> *Id.*, ¶¶15, 19.

<sup>67</sup> *Id.*, ¶17.

<sup>68</sup> *Id.*, ¶20.

<sup>69</sup> *Sandhya Chatterjee v. Salil Chandra Chatterjee*, AIR 1980 Cal 244.

the case of *Printing and Numerical Registering Co. v. Sampson*<sup>70</sup> further held that while declaring a contract to be invalid for being contrary to public policy, a court should also consider the paramount public policy concern in terms of respecting free and voluntary contract between two adult persons.<sup>71</sup> Thus, it was observed that with the change of time and advancement of the society, law changes and the wife's demand for separate maintenance when living independently was justified and not against public policy.<sup>72</sup>

A review of these case laws relating to Hindus indicates that with the passage of time, the decisions of Indian courts have slowly but steadily changed their direction. Yet, it is interesting to note that courts in most cases have not accorded validity to the prenuptial agreements by themselves. Instead they have adopted two methods to interpret prenuptial agreements before them as valid—first, by enforcing the terms of the prenuptial agreement alongside other legal principles, such as those pertaining to property law, and second, by creating exceptions within the broader framework of judicial precedents which have viewed prenuptial agreements as invalid due to their conflict with public policy.

## 2. Prenuptial agreements in Muslim marriages

While it is established that marriage is a civil contract for Muslims, a study of the trend in case laws relating to the interpretation of prenuptial agreements in Muslim marriages by Indian courts brings forth several interesting findings.

### 1.1. Invalid prenuptial agreements

In the case of *Bai Fatma v. Ali Mahomed Aiyab*,<sup>73</sup> the question before the Bombay High Court was whether the agreement between a Muslim husband and his wife, providing for payment of specified maintenance in the event of future separation was valid. The court observed that an agreement providing for and thereby encouraging future separation between spouses must be pronounced void on account of being against public policy.<sup>74</sup> The court had referred to English law of the time while delivering this judgment. Interestingly, in the present day situation, the Supreme Court of England in the Radmacher case while upholding prenuptial agreements has observed that “(t)he reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated.”<sup>75</sup>

In *Khatun Bibi v. Rajjab*,<sup>76</sup> a husband sued his wife for restitution of marital rights. The wife argued that she had divorced her husband due to non-fulfilment of the prenuptial agreement which stated that the ‘would be’ husband must stay with his wife in his mother-in-law's house and would not live in any other place without the permission of his prospective wife or mother-in-law, and in case of any deviation the mother-in-law might arrange remarriage of her

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<sup>70</sup> *Printing and Numerical Registering Co. v. Sampson*, (1875) 19 Eq 462.

<sup>71</sup> *Sandhya Chatterjee v. Salil Chandra Chatterjee*, AIR 1980 Cal 244, ¶14.

<sup>72</sup> *Id.*, ¶21.

<sup>73</sup> *Bai Fatma v. Ali Mahomed Aiyab*, (1912) 14 BomLR 1178.

<sup>74</sup> *Id.*, ¶3.

<sup>75</sup> *Radmacher v. Granatino*, (2010), UKSC 42, ¶78.

<sup>76</sup> *Khatun Bibi v. Rajjab*, AIR 1926 All 615.

daughter to someone else. The High Court of Allahabad held that binding the liberty of the husband was against public policy. Moreover, it was observed that premarital agreement forcing the husband to reside in the mother-in-law's house for the entirety of the marital relation was invalid under Mohammedan law.<sup>77</sup>

Under the prenuptial agreement in *Ahmad Kasim Molla v. Khatun Bibi*<sup>78</sup> ('Kasim Molla'), the prospective husband promised that if any harsh treatment was done by him, his bride could leave him and he would be bound to pay her an amount as subsistence allowance and house rent each month. The husband ill-treated the wife and the wife left him. Thereafter, the husband sent a *talaknama* which was not received by the wife. The High Court of Calcutta held that for divorce to take effect it was not necessary that the *talaknama* must reach but for getting maintenance the bride must know about the divorce as the *iddat* period would be counted from the time that she gained knowledge about it.<sup>79</sup> It was also held that since it could not be proved that the bride had knowledge of the *talaknama* prior to institution of the suit, she had right to maintenance for the interim period.<sup>80</sup> The Court further observed that as in the *kabinnama* i.e. prenuptial agreement, no period for subsistence allowance was mentioned, divorce was not mentioned and the parties referred to as bride and bridegroom, the plaintiff husband did not have any responsibility to pay any maintenance allowance after dissolution of the marriage and the defendant wife was only entitled to get maintenance expenses for the *iddat* period. Justice Costello, however, mentioned that the verdict contained bad law and clarified that he had strictly followed the legal points and was not bound by the ethical aspects of the matter.<sup>81</sup>

A review of the aforementioned cases indicates that public policy concerns in relation to the validity of prenuptial agreements are not limited to such agreements which are entered between Hindus. Even among prenuptial agreements entered into between Muslim couples, courts can bring in public policy concerns to invalidate the agreement. The tendency of courts in this regard appears to have been to particularly invalidate those agreements which specifically appear to be encouraging separation of the spouses. Further, agreements with terms restricting the freedom of one of the spouses or going against Mohammedan law have been viewed to be invalid. There also appears to be a tendency to strictly interpret the clauses of the *nikahnama*, which serves as the prenuptial agreement.

## 1.2. Valid prenuptial agreements

The general treatment of courts towards prenuptial agreements entered in the context of Muslim marriages though appears to be positive.

The High Court of Allahabad in the case of *Muhammad Muin-Ud-Din v. Musammat Jamal Fatima*<sup>82</sup> ('Muin-Ud-Din'), upheld the validity of a prenuptial agreement

<sup>77</sup> *Id.*, ¶6.

<sup>78</sup> *Ahmad Kasim Molla v. Khatun Bibi*, AIR 1933 Cal 27.

<sup>79</sup> *Id.*, ¶18.

<sup>80</sup> *Id.*, ¶22.

<sup>81</sup> *Id.*, ¶¶31, 32. After almost seven decades, one of the propositions made in the *Kasim Molla* case was overruled by the Supreme Court of India in the judgment of *Shamim Ara v. State of U.P.*, (2002) 7 SCC 518. It was held that "a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating *talaq* on the date of delivery of the copy of the written statement to the wife".

<sup>82</sup> *Muhammad Muin-Ud-Din v. Musammat Jamal Fatima*, (1921) ILR 43 All 650.

which had provided that the husband would pay maintenance in addition to dower debt in case of dissension between the spouses. In *Buffatan Bibi v. Sheikh Abdul Salim*<sup>83</sup> ('Buffatan Bibi') the plaintiff husband sued the wife for restitution of conjugal rights. The wife alleged that since the husband had failed to fulfil the terms of *kabinnama* duly executed by the plaintiff as a prenuptial agreement, she had divorced herself and was not his wife anymore. The Calcutta High Court observed that Mohammedan law allowed a person to confer his power of repudiation of marriage to his wife.<sup>84</sup> It held that as part of the *kabinnama*, the husband had authorised the wife to stay in her father's house in case of animosity and conferred on her the power to get divorced if he failed to maintain her for six consecutive months, and this was in the nature of a valid agreement.<sup>85</sup>

In *Saifuddin Sekh v. Soneka Bibi*,<sup>86</sup> the plaintiff-respondent wife dissolved the marriage as the husband could not fulfil the terms of *kabinnama*. As per the prenuptial agreement, the husband was barred from bringing any of his former two wives to stay with him without the consent of the plaintiff wife and if he did so, the plaintiff wife would be entitled to divorce him. Here, the agreement neither put any impediment to enjoy conjugal life on the other two wives nor obstructed the husband to hold relationship with the other wives. It only said that he had to take consent from her before bringing any of his former wives to reside with him. Therefore, according to the Gauhati High Court, the agreement was not by effected by §23 of the Indian Contract Act, 1872 as it was not opposed to public policy.<sup>87</sup>

In *Razia Begum v. Sahebzadi Anwar Begum*,<sup>88</sup> as per the prenuptial agreement, the husband agreed to pay the plaintiff wife an amount per month as *kharch-e-pandan* but stopped payment without providing any reasons. The plaintiff approached the Court to declare her entitlement to receive monthly *kharch-e-pandan* as per prenuptial agreement. However, the husband just after ten days of filing the suit admitted the entire claim of the plaintiff, so the viability of the claim was not decided therein. However, based on the nature of legal interpretations discussed, it appears that the claim if it were not to have been admitted would have been entertained by the relevant court.

The case of *Mohd. Khan v. Mst. Shahmali*<sup>89</sup> is a thought-provoking so far as matters related to prenuptial agreement, Islamic law and public policy are concerned. The case was that the marriage had taken place following a prenuptial agreement where the defendant husband had agreed to live as a *khana damad* in the house of the plaintiff's father and would have to pay a sum of money as expenditure towards marriage ceremony if he left. As per the terms of the agreement, non fulfilment of this condition would automatically lead to divorce. The husband ran away from the house for four years and did not fulfil the marital obligations. The question to the second appellate court i.e. the High Court of Jammu & Kashmir was whether the agreement was unenforceable as per Muslim law and public policy. The High Court observed that the practice of *khana damad* in the Kashmir valley was usual, with the practice being

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<sup>83</sup> *Buffatan Bibi v. Sheikh Abdul Salim*, AIR 1950 Cal 304.

<sup>84</sup> *Id.*, ¶2.

<sup>85</sup> *Id.*, ¶5.

<sup>86</sup> *Saifuddin Sekh v. Soneka Bibi*, AIR 1955 Gau153.

<sup>87</sup> *Id.*, ¶6.

<sup>88</sup> *Razia Begum v. Sahebzadi Anwar Begum*, 1959 SCR 1111.

<sup>89</sup> *Mohd. Khan v. Mst. Shahmali*, AIR 1972 J&K 8.

voluntary, where the *khana damad* customarily enjoyed several amenities, and a substantial sum of money was generally spent by the father-in-law for the marriage. Therefore, payment by the son-in-law as per the terms of the agreement would not be opposed to public policy.<sup>90</sup> While referring to the Muin-Ud-Din and the Buffatan Bibi cases, the court further held that divorce transpired from such agreement would not be against Muslim law.<sup>91</sup>

A study of these cases indicates an orientation of Indian courts towards giving effect to prenuptial agreements entered into by Muslim couples. It is worth noting that initial invalidation of such agreements was based partly on the existing stance on public policy promulgated by British courts. Given that in the late 19th century there appears to have been a simplistic understanding in vogue that planning ahead for separation indicated intent to separate in the future, judicial perceptions of public policy were shaped accordingly. Yet, later cases appear to have adopted a more liberal stance, with courts taking into account factors such as the circumstances in which the prenuptial agreement was entered and whether there are inherent restrictions on the rights of the spouses while considering the public policy question.

### C. PRENUPTIAL AGREEMENTS IN OTHER COMMUNITIES IN INDIA

In this context, it is also necessary to peruse the case of *Mozelle Robin Solomon v. Lt. Col. R.J. Solomon*,<sup>92</sup> Indian Divorce Act, 1869 and Goa's Civil Code in order to understand the legal position of prenuptial agreements *vis-à-vis* other applicable laws. In *Mozelle Robin Solomon v. Lt. Col. R.J. Solomon*, law related to the marriage and divorce among Jews was reviewed and it was affirmed that "Jewish marriage is a contract and not a religious sacrament".<sup>93</sup> By extension therefore, it is argued that similar to the treatment of prenuptial agreements in the context of Muslim marriages, which are also in the nature of civil contracts, prenuptial agreements could also be capable of being given effect in relation to Jewish marriages in India, subject to the broader principles of a modernised public policy framework. In terms of Christianity, the position is largely straightforward as it is already established that in relation to separation of Christian married couples, prenuptial agreements entered into between them can be considered by Indian courts while passing orders on the settlement of property under the Divorce Act.<sup>94</sup>

Attention should also be given to understand the position in Goa, which has in place a uniform civil code based on the Portuguese Civil Code, 1867, meaning that personal laws do not have any influence there.<sup>95</sup> A prenuptial agreement for property distribution is allowed under Portuguese Civil Code.<sup>96</sup> If no agreement is made it is presumed that they have married under communion of assets.<sup>97</sup> Communion of property entitles and safeguards the wife's right to

<sup>90</sup> *Id.*, ¶¶5, 6.

<sup>91</sup> *Id.*, ¶8-10.

<sup>92</sup> *Mozelle Robin Solomon v. Lt. Col. R.J. Solomon*, 1979(81) BOMLR 578.

<sup>93</sup> *Id.*, ¶33.

<sup>94</sup> Divorce Act, 1869, §40 (India).

<sup>95</sup> *Jose Paulo Coutinho v. Maria Luiza Valentina Pereira*, 2019 SCC OnLine SC 1190, ¶24.

<sup>96</sup> Portuguese Civil Code, 1867, Art. 1096.

<sup>97</sup> *The Select Committee on Bill No. 36 – The Goa Succession, Special Notaries & Inventory Proceeding Bill, 2008*, Series I, No. 20, Official Gazette—Govt. Of Goa, August 12, 2010; Disha Pareek, *Civil Code Of Goa Vs Personal Laws in India*, IPLEADERS, July 17, 2016, available at <https://blog.ipleaders.in/civil-code-go-vs-personal-laws->

receive equal share in the property brought into the marriage by both spouses. The position of law provided under Goa's Civil Code has been appreciated widely, with the Supreme Court of India in the case of *Damodar Ramnath Alve v. Shri Gokuldas Ramnath Alve*<sup>98</sup> observing that the Portuguese Civil Code has strengthened the “basic unit of the society—the family—by safeguarding the interests of the children and of widows”.

#### D. PUBLIC RECEPTION TOWARDS PRENUPTIAL AGREEMENTS

Although there appears to be a positive trend towards recognition of prenuptial agreements within the judiciary, due to the nebulous contours of public policy and the absence of legislative reference to prenuptial agreements, whether a prenuptial agreement will finally be given effect in a court of law remains somewhat indeterminate.

In spite of this, an increasing number of couples belonging to affluent socio-economic class appear to showcase preference for entering into prenuptial agreements.<sup>99</sup> In cities like Mumbai and Delhi almost 20 percent marriages are reported to be involving prenuptial agreements,<sup>100</sup> with these agreements being meant to serve as predetermined arrangements about matters associated with the spouses such as the future dealings with finances, individual liabilities, and child custody.<sup>101</sup> In most of the cases, the prospective spouses know that such documents may not have legal teeth but they feel that a prenuptial agreement imposes some moral obligations.<sup>102</sup>

Under the present circumstances, it appears that the rising popularity of prenuptial agreements is making the Indian government take cognizance of the role of such agreements in regulating marital relations. This recognition by the State is reflected in the periodic efforts being undertaken by the Ministry of Women and Child Development to discuss the viability of giving legal effect to prenuptial agreements.<sup>103</sup> Reports suggest however, that consultations have indicated that there is a perception within the relevant Central Government ministries that it is too early to go forward with according a legal status to prenuptial agreements and feasibility of

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india/ (Last visited on June 13, 2019); NANDINI CHAVAN & QUTUB JEHAN KIDWAI, PERSONAL LAW REFORMS AND GENDER EMPOWERMENT: A DEBATE ON UNIFORM CIVIL CODE 245-46 (2006).

<sup>98</sup> *Damodar Ramnath Alve v. Shri Gokuldas Ramnath Alve*, 1997 (4) BomCR 653.

<sup>99</sup> Dilshad Billimoria, *Prenuptial agreements: building a safety net around assets*, LIVE MINT, January 21, 2016, available at <https://www.livemint.com/Money/ngLavHhlUeaCqDN2xoqa2K/Prenuptial-agreements-building-a-safety-net-around-assets.html> (Last visited on June 12, 2019).

<sup>100</sup> Arunima Jha, *Pre-Nuptial Agreement: A Death Knell for Marriage*, A.P. LEGAL SERVICES PVT. LTD., available at <http://www.goforthelaw.com/index.php/browsearticles/loadarticleview/181.html> (Last visited on June 13, 2019).

<sup>101</sup> A. Ghosh & P. Agarwal, *Prenuptial Agreement: A Necessity of Modern Era*, 2(5) INTERNATIONAL J OF RESEARCH AND ANALYSIS 23 (2014).

<sup>102</sup> *Parting Shot*, THE TELEGRAPH, Kolkata, April 4, 2012, available at [https://www.telegraphindia.com/1120404/jsp/opinion/story\\_15332562.jsp#.T32fB3k3PIV](https://www.telegraphindia.com/1120404/jsp/opinion/story_15332562.jsp#.T32fB3k3PIV) (Last visited on June 13, 2019); Indulekha Aravind & Priyanka Sharma, *Legally Bound*, BUSINESS STANDARD, January 20, 2013, available at [http://www.business-standard.com/article/beyond-business/legally-bound-112072100025\\_1.html](http://www.business-standard.com/article/beyond-business/legally-bound-112072100025_1.html) (Last visited on June 12, 2019).

<sup>103</sup> Raghav Ohri, *As marital bliss eludes couples, pre-nuptial agreements mark their Indian debut*, THE ECONOMIC TIMES, September 18, 2015, available at <https://economictimes.indiatimes.com/news/politics-and-nation/as-marital-bliss-eludes-couples-pre-nuptial-agreements-mark-their-indian-debut/articleshow/49005548.cms> (Last visited on June 12, 2019); *I do—and I want*, THE TELEGRAPH, November 25, 2015.

such a move requires further consideration.<sup>104</sup> Thus, at the moment, the extent of the State's receptiveness towards prenuptial agreements is not entirely apparent.

### III. ADDRESSING RESISTANCE TO PRENUPTIAL AGREEMENTS

The response towards prenuptial agreements would invariably be shaped by the nature of perceptions surrounding them. The experience of Indian couples and the perspective presented by Indian courts demonstrates that the concept of prenuptial agreements has been resisted consistently in India. In this Part, we seek to deliberate on the tenets of possible opposition to the granting of legal value to prenuptial agreements. Following an analysis of the basic arguments that may be raised against prenuptial agreements, we seek to rebut the premises of such arguments which may be advanced, with a view towards establishing an alternative narrative.

#### A. ON THE EFFECT ON THE SANCTITY OF MARRIAGE

The perception of marriage as a sacrosanct institution of Indian society poses the primary hurdle in the path of legal acceptance of prenuptial agreements. Under traditional Hindu law mentioned in the religious texts, marriage was considered to be a sacred institution forming the basis of family in India and thereby deemed necessary for the existence of a civilised society.<sup>105</sup> This archaic perspective towards marriage may provide support to ideas suggesting that introducing prenuptial agreements, which are essentially in the nature of contracts, within the broader conception of marriage will take away from its sacred character.<sup>106</sup> The incorporation of prenuptial agreements within the fabric of Indian marriages may further be challenged on the basis that prenuptial agreements can potentially encourage couples to envision the end of the marriage prior to being bound in the marital bond itself, which in turn, may potentially result in termination of marriages being viewed as the norm rather than the exception in India.<sup>107</sup>

One may further argue that legalising prenuptial agreements can give rise to a view in the minds of married spouses that there is an easily accessible escape route in case anything were to go wrong.<sup>108</sup> It may also be stated that this may ultimately induce them to choose separation or termination of marriage instead of attempting to work together to reduce the differences between them, thereby shifting the resolution of marital disputes out of the domestic sphere and into the public arena of courts.<sup>109</sup> The argument would thus, be that if a majority of couples begin taking the separation route due to the presence of pre-negotiated terms of marriage and separation, the institution of marriage itself may begin to lose its importance within society. In a dystopian sense this could in turn be said to have the potential to give credence to the

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<sup>104</sup> Moushumi Das Gupta, *Too early to give prenuptial agreement legal backing: Govt*, HINDUSTAN TIMES, March 2, 2018, available at <https://www.hindustantimes.com/india-news/too-early-to-give-prenuptial-agreement-legal-backing-govt/story-1AK9s4oUMRT6eGdKtDgbYM.html> (Last visited on June 12, 2019).

<sup>105</sup> KUSUM, FAMILY LAW LECTURES: FAMILY LAW I, (4th ed., 2015).

<sup>106</sup> See also *Letters—Live in relationships*, THE HINDU, December 2, 2013, available at <http://www.thehindu.com/opinion/letters/livein-relationships/article5411360.ece> (Last visited on June 13, 2019).

<sup>107</sup> Samarth Singh, *India's stigma: The Prenuptial Agreement*, April 14, 2015, available at <http://www.samarthsingh.com/indias-stigma-the-prenuptial-agreement> (Last visited on June 13, 2019).

<sup>108</sup> See BJ Mann, *Does a Prenuptial Agreement Lead to Divorce?*, March 15, 2016, available at <https://www.linkedin.com/pulse/does-prenuptial-agreement-lead-divorce-bj-mann/> (Last visited on June 13, 2019).

<sup>109</sup> *Id.*

viewing of marriage as being a purely legal dealing between two parties, with no regard to non-legal elements like love, affection and family which currently play a prominent role in marriages.

This fear of loss of sanctity of marriage can arguably be contested by an understanding of the evolution that the nature of marriage in India has undergone. At the onset, it is to be noted that the contractual nature of marriage has been part of legal understandings of Islamic law from the beginning.<sup>110</sup> Yet it must be kept in mind that even under Islam, marriage is regarded as a sacrosanct contract.<sup>111</sup> As a result, the Islamic marital contract cannot be treated similar to ordinary transactional contracts.<sup>112</sup> Additionally, under Hindu law, marriage is also now recognised as a civil contract in addition to being a sacrament.<sup>113</sup> Moreover, under Christian canonical law, although marriage is considered as a sacramental contract,<sup>114</sup> prenuptial agreements are recognised and courts may provide for their application in necessary cases.<sup>115</sup> In light of the fact that marriage is now recognised to have contractual elements under several personal laws prevalent in India, without taking away from its sacramental element as envisioned under religion, it is argued on a similar thread that introducing prenuptial agreements as contracts within the marital relation is unlikely to adversely impact its sanctity.

Further, in terms of the fear of prenuptial agreements affecting the marital relation, in social terms, it is submitted that in light of the changing attitudes in Indian society, prenuptial agreements should now be regarded as risk prevention tools instead of ‘marriage breaking instruments’. Indeed, prenuptial agreements have not been demonstrated to be deterrents to entering into the marital bond but instead have been proven across the world to serve as safeguards in the unlikely event of the marital relation falling apart.<sup>116</sup> In fact, prenuptial agreements can arguably help improve the marital life of a couple by building a strong marital foundation based on effective communication and concurrence on sensitive issues and full disclosure about respective liabilities and responsibilities, at the eve of marital life.<sup>117</sup>

### B. ON THE POTENTIAL OF MISUSE OF EMOTIONAL AFFINITY

Prenuptial agreements may also face resistance in India due to their perceived capacity of being used to the disadvantage of the male spouse.<sup>118</sup> Those using this line of reasoning to argue against according legal validity to prenuptial agreements may stress that women or men who seek to use marriage as a means of acquiring wealth may induce their

<sup>110</sup> KUSUM, *supra* note 105.

<sup>111</sup> Sirajmohammad Khan v. Jan Mohammad, AIR 1981 SC 1972.

<sup>112</sup> Muhammad Munir, *Marriage in Islam—A Civil Contract or Sacrosanct?*, 30(1) HAMDARD ISLAMICUS 77-84 (2008).

<sup>113</sup> B. Muthusami Mudaliar v. Masilamani, 5 Ind Cas 42; Bhagwati Saran Singh v. Parmeshwari Nandar Singh, ILR 1942 All 518; Anjona Dasi v. Ghose, 6 BengLR 243.

<sup>114</sup> Peter Philip Saldanha v. Anne Grace Saldanha, (1930) 32 BOMLR 17.

<sup>115</sup> The Divorce Act, 1869, §40 (India).

<sup>116</sup> See Kelly Frawley & Emily Pollock, *How A Prenuptial Agreement Can Help Protect Your Business Interests*, FORBES, available at <https://www.forbes.com/sites/frawleypollock/2019/07/20/how-a-prenuptial-agreement-can-help-protect-your-business-interests/#289dc4644f94> (Last visited on June 14, 2019).

<sup>117</sup> See Katherine Stoner & Shae Irving, *Working Together* in PRENUPTIAL AGREEMENTS: HOW TO WRITE A FAIR & LASTING CONTRACT 262-264 (5th ed., 2016).

<sup>118</sup> See also Bindu N. Doddahatti, *The Dangerous, False Myth That Women Routinely Misuse Domestic Cruelty Laws*, THE WIRE, August 11, 2017, available at <https://thewire.in/166766/section-498a-domestic-cruelty-laws/> (Last visited on June 14, 2019).

fiancés to enter terms in the prenuptial agreements providing for huge amounts of alimony and other financial benefits which would accrue to them upon divorce or separation on the belief that such separation would not take place at all.<sup>119</sup> Some may also argue that negotiations in such cases can put prospective husbands in a vulnerable position, making it easy for brides to exploit the emotional inclination of their prospective husbands towards them for their own benefit.<sup>120</sup>

In such cases, it may be stated that by the time the husband or wife discovers the ‘schemes’ of his or her spouse, it can become difficult for him or her to seek non-enforcement of the contract, since he had consented to the terms at the time of signing the contract.<sup>121</sup> Further, although in such situations there is often an element of deceit involved; it may become difficult to prove the same to an adequate extent before the court so as to warrant voiding or annulment of the prenuptial agreement. Moreover, one may argue that the restriction and elimination of options—which would otherwise have been available in case of conventional divorce proceedings—that is agreed upon by spouses by means of prenuptial agreements may further be detrimental to the spouse in case of circumstances previously not envisioned by him or her.<sup>122</sup> For instance, the wife who earned INR 10 lakh a year at the time of the marriage may lose her high paying job, reducing her earnings to INR 2 lakh a year, and this may occur immediately prior to or at the time of the divorce. In such a case, having agreed to claim no alimony in the event of divorce can translate negatively for the wife, if the prenuptial agreement were to be given effect.

There is a three part rebuttal which can be presented against the argument of such possible misuse of prenuptial agreements. First, just because something can be potentially misused cannot be a reason for rejecting its introduction within the legal framework.<sup>123</sup> Further, there is no data to indicate that the misuse of prenuptial agreements which can take place shall be greater than the misuse witnessed in relation to other existing provisions of law or legal instruments. As shall be demonstrated in Part V, prenuptial agreements if utilised appropriately can serve as instruments beneficial to spouses. It is therefore, suggested that as attempted with §498A of the Indian Penal Code, 1860,<sup>124</sup> procedural safeguards can be developed to curb the possibility of misuse of prenuptial agreements instead of refusing to accord them with legal validity altogether.

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<sup>119</sup> See also Brian Brix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 (1) WILLIAM & MARY LAW REVIEW 169, 170 (1998).

<sup>120</sup> See Lisa Aronson Fontes, *The Prenup Trap: Premarital Agreements and Coercive Control*, April 28, 2016, available at <https://www.psychologytoday.com/blog/invisible-chains/201604/the-prenup-trap-premarital-agreements-and-coercive-control> (Last visited on June 14, 2019).

<sup>121</sup> See CHANDRA, *supra* note 23.

<sup>122</sup> See LAURIE ISRAEL, *THE GENEROUS PRENUP: HOW TO SUPPORT YOUR MARRIAGE AND AVOID THE PITFALLS* 20 (2018).

<sup>123</sup> A closely associated line of argumentation has been presented by the Law Commission of India in relation to §498A wherein it has stated that “Its object and purpose cannot be stultified by overemphasizing its potentiality for abuse or misuse. Misuse by itself cannot be a ground to repeal it or to take away its teeth wholesale. The re-evaluation of §498A merely on the ground of abuse is not warranted.” Law Commission of India, *Section 498A IPC*, Report No. 243 (August 2012) 14, ¶7.1.

<sup>124</sup> A division bench of the Supreme Court sought to issue guidelines for the prevention of misuse of Section 498A of the Indian Penal Code (pertaining to the offence of husband or relative of husband of a woman subjecting her to cruelty) by its judgment in *Rajesh Sharma v. State of Uttar Pradesh*, (2018) 10 SCC 472. The directions given in this respect were subsequently modified by a three judge bench in *Social Action Forum Manav for Manav Adhikar v. Union of India*, (2018) 10 SCC 443.

Second, if given legal recognition, prenuptial agreements are likely to operate based on basic contractual principles and thereby safeguards allowing for voiding of contracts based on extraneous considerations like undue influence and fraud, and permitting non-performance on grounds of frustration will operate in order to safeguard the interest of a spouse against possible misuse of terms of the prenuptial agreement. Third, given the unique nature of marital contracts in the societal context, it is submitted that courts would be likely to limit the application of the terms of the prenuptial agreement if they would have an inherently detrimental effect on spouses. For instance, if giving effect to a ‘no alimony’ clause will render the divorced wife incapable of maintaining herself, the court may in its wisdom go beyond the terms of the prenuptial agreement and require financial support to be extended by the divorced husband.<sup>125</sup>

### C. ON THE POSSIBILITY OF EXPLOITATION OF VULNERABLE WOMEN

Yet other critics of prenuptial agreements may possibly view prenuptial agreements as tools available to husbands for exploitation of their wives. In this respect they may point out that in Indian marriages, the wife is generally considered to have lesser agency and power than her husband.<sup>126</sup> The environment of many families in fact reduces the autonomy of the females with reference to decision making regarding their spouse.<sup>127</sup> This, in addition to the perception of women as burdens on the family within a patriarchal society, may increase the opportunity for husbands to compel their wives to begin the marital relations by agreeing to agreements which are essentially oppressive in nature.<sup>128</sup>

Those opposing legality of prenuptial agreements on this ground may also state that even if provisions in prenuptial agreements seeking to defeat the provisions of legislations meant for the benefit of women would be legally prohibited from being given effect, there would be nothing to prevent a husband from abusing his wife and silencing her voice by convincing her that she signed away her rights and protections under these legislations when she signed the prenuptial agreement.<sup>129</sup> Expecting wives to be aware of legal technicalities in this respect in all instances could be viewed as overly optimistic. This could be especially true for women from weaker economic backgrounds or rural areas who have not received education to a level which would enable them to discern the truthfulness of the claim made by the husband.<sup>130</sup>

Moreover, it may be argued that prenuptial agreements may be used to bypass the provisions of beneficial legislations like the Dowry Prohibition Act, 1961. For instance, a man

<sup>125</sup> *Prenuptial Agreement Options*, MCILVEEN FAMILY LAW FIRM, available at <https://www.mcilveenfamilylaw.com/pre-nuptial-agreement-options/> (Last visited on June 15, 2019) (Courts in North Carolina can require a spouse to extend financial support to the dependent spouse in the event that enforcing an agreement to the effect that no financial support would be given, would result in the dependent spouse becoming reliant on state supported public assistance).

<sup>126</sup> Saarthak India, *Women's Situation in India*, available at [http://saarthakindia.org/womens\\_situation\\_India.html](http://saarthakindia.org/womens_situation_India.html) (Last visited on June 15, 2019).

<sup>127</sup> Lavanya Garg, *Only 5% Of Women in India Choose Their Husbands, 80% Need Permission To Visit A Health Centre*, HUFFPOST, February 13, 2017, available at [https://www.huffingtonpost.in/2017/02/13/only-5-of-women-in-india-choose-their-husbands-80-need-permis\\_a\\_21713027/](https://www.huffingtonpost.in/2017/02/13/only-5-of-women-in-india-choose-their-husbands-80-need-permis_a_21713027/) (Last visited on June 15, 2019).

<sup>128</sup> Utpal Dholakia, *How Do Indian Women Fare In An Arranged Marriage?*, PSYCHOLOGY TODAY, December 15, 2015, available at <https://www.psychologytoday.com/blog/the-science-behind-behavior/201512/how-do-indian-women-fare-in-arranged-marriage> (Last visited on June 15, 2019).

<sup>129</sup> Gupta, *supra* note 104.

<sup>130</sup> See Gail Frommer Brod, *Prenuptial Agreements and Gender Justice*, 6, YALE J.L. & FEMINISM 229, 279 (1994).

from a relatively wealthy background can marry a woman from a relatively less wealthy background and his family may claim large sums of money from her family as dowry. He may then make her sign a prenuptial agreement stating that the amount of money which she receives from her family as gift of marriage is being voluntarily transferred to him without any claim for the same from his side. In such a case it may be argued that the wife may later find it difficult to seek remedy under the relevant provisions of the Dowry Prohibition Act in relation to this claim for money made by her in-laws. Similarly, a groom may make his fiancé sign a prenuptial agreement stating that he is permitted to hit her during coitus in pursuance of physical pleasure. In such a case, it may become difficult for a wife to differentiate from an evidentiary point of view between wounds consensually received in pursuance of physical pleasure and wounds attributable to domestic violence.

With respect to the potential of using prenuptial agreements as an instrument for exploiting women, we argue that the same can be dealt with by introducing a presumption against the validity of prenuptial agreements which contain terms which are *prima facie* detrimental to the interests of the wife, particularly if it is demonstrated that the wife is at a weaker bargaining position due to financial instability or other relevant reasons.<sup>131</sup> Such a presumption can also be extended to agreements with terms which appear to promote or allow for situations which are otherwise statutorily prohibited. The presumption in this respect can be with regard to the absence of legal intention by the wife and can be made rebuttable in nature much like the rebuttable presumption which exists against the presence of legal intention in domestic agreements.<sup>132</sup> The operation of such a presumption in select circumstances by shifting the burden on the husband to prove free consent and good faith could arguably help in safeguarding vulnerable wives from being oppressed by prenuptial agreements, regardless of whether they were accepted voluntarily or under duress.

#### D. ON PUBLIC POLICY CONCERNS

Finally, public policy is a factor which may be used to argue against the legality of prenuptial agreements, given the heavy reliance on the same by Indian courts for this purpose. This argument is particularly important to note since even if legal validity were to be accorded to prenuptial agreements, the same would be futile if the agreements are found to be against public policy.<sup>133</sup>

In view of the trends in cases discussed in Part II of this paper, the concern with respect to public policy can arguably be addressed in a two-fold manner. First, it may be considered that most of the cases holding prenuptial agreements to be against public policy have been decided several decades prior. As public policy evolves with the passage of time,<sup>134</sup> we

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<sup>131</sup> See *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990) (Although providing a different position upon analysis of the changing societal circumstances in the United States, the Supreme Court of Pennsylvania observed that earlier decisions relating to prenuptial agreements had been influenced by the understanding of the unequal status between spouses).

<sup>132</sup> See *Balfour v Balfour*, (1919) 2 KB 571.

<sup>133</sup> Indian Contract Act, 1872, §§10, 23 (India).

<sup>134</sup> *Bhagwant Genuji Girme v. Gangabisan Ramgopal*, AIR 1940 Bom 369; Carsten Daugbjerg & Rasmus Brun Pedersen, *Temporal analysis of public policy evolution: Policy sequences and process tracing*, available at [https://www.psa.ac.uk/sites/default/files/conference/papers/2014/PSA\\_2014\\_Daugbjerg\\_Pedersen%20Submitted\\_0.pdf](https://www.psa.ac.uk/sites/default/files/conference/papers/2014/PSA_2014_Daugbjerg_Pedersen%20Submitted_0.pdf) (Last visited on June 17, 2019).

argue that the passage of several decades in between when viewed alongside the changing social perceptions in India should bear testimony to the evolution of public policy in India.<sup>135</sup> At the least, considering the long duration of time which has passed, there exists a need to reexamine the application of public policy considerations through a modern lens, having regard to the societal changes which have occurred in the interim.<sup>136</sup>

However, it is acknowledged that this argument is largely intuitive and resultantly vulnerable to attacks on the grounds that simply because public policy may have evolved does not mean that prenuptial agreements are not against the evolved public policy. Further, in a legal sense even in the absence of recent judgments, the older precedents still hold good in relation to similar factual circumstances, no matter how outdated they may appear in light of societal developments. Therefore, this necessitates a second argument, in that a review of the cases considered demonstrates that with the exception of a few decisions, in the majority of cases, prenuptial agreements as a whole are not regarded as opposed to public policy. Instead, it appears that the holding of a prenuptial agreement as against public policy has been specific to the facts in question, with courts generally having struck down those agreements which contain oppressive terms or terms conflicting with rights conferred by the respective religion. Thus, prenuptial agreements in general should not be viewed as opposed to public policy; rather it is the possible inclusion of oppressive terms in such agreements which should be resisted.

#### IV. THE STATUS OF PRENUPTIAL AGREEMENTS: A GLOBAL OVERVIEW

Prenuptial agreements can play beneficial roles by acting as future reference frameworks for spouses to rely on in relation to the demarcation of their responsibilities owed to each other.<sup>137</sup> They can also serve as key evidence to help bring in transparency in divorce suits.<sup>138</sup> Despite these plausible benefits, the utility of such agreements cannot be said to be established uniformly on a global basis. Different countries presently hold prenuptial agreements under different legal standards. An analysis of the status of prenuptial agreements in five nations of study reveals some key developments. The revelations in this Part are worth considering, as they not only emphasise on the diverse approaches of various legal jurisdictions towards addressing the same basic family law problems but also affirm that no prenuptial agreement is hermetic.

In this exercise, discussion is undertaken of the present status of prenuptial agreements in five nations, namely United States of America ('United States'), Canada, China, and Turkey. These countries have been selected for this study in light of the established use of prenuptial agreements in these jurisdictions for regulating marital relations. In each of the states, some safeguards exist either to secure the autonomy of the future spouses or to secure a prospective spouse against deprivation of rights on account of the exercise of autonomy by the other spouse.

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<sup>135</sup> See also *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

<sup>136</sup> *Nagle v. Fielden*, (1996) 2 QB 633, 650.

<sup>137</sup> See *Prenuptial Agreements: Yours, Mine and Ours*, PRIDE LEGAL, February 12, 2019, available at <https://pridelegal.com/prenuptial-agreements/> (Last visited on June 17, 2019).

<sup>138</sup> See Giacomo Oberto, *Prenuptial Agreements in Contemplation of Divorce: European and Italian Perspectives in PARTY AUTONOMY IN EUROPEAN PRIVATE (AND) INTERNATIONAL LAW* 221-245 (Bettina Heiderhoff & Ilaria Queirolo ed., 2015).

### A. PRENUPTIAL AGREEMENTS IN ENGLAND

Under English law, prenuptial agreements were traditionally not viewed to be binding legal contracts.<sup>139</sup> As per law, the authority to decide ancillary relief linked with spousal property ownership arrangements, maintenance payments, pass on pensions and award of financial directives in the event of breakdown of marriage lies on the courts<sup>140</sup> as a result of delegation of powers under The Matrimonial Causes Act, 1973.<sup>141</sup>

In earlier English cases, it was held that any agreement providing financial incentives to one spouse either for separation or for breaking away from the marriage without pursuing restitution of conjugal rights was bad for the institution of marriage.<sup>142</sup> Such agreements were treated as void since they were seen as contrary to public policy based on the idea that marriage is an agreement for staying together and an agreement for separation clashes with the policy of marriage.<sup>143</sup>

Eventually, in the late 1920s, more specifically, in the judgment in *Hyman v. Hyman*,<sup>144</sup> the validity of a separation agreement was accepted but any efforts through such agreements which were meant to prevent the matrimonial courts from exercising their power to award financial remedy were declared to be void.<sup>145</sup> Subsequently, this Hyman principle was recognised in the Matrimonial Causes Act, 1973.<sup>146</sup> Interestingly, the Indian position for long maintained consistency with the British position of the time as is evident from several older Indian cases described earlier.<sup>147</sup> Evidently, in a range of lawsuits between Hindu spouses, reliance was placed on British precedent to hold that any prenuptial agreement for future separation is contrary to the public policy as it is against marital obligation under Hindu law.<sup>148</sup>

Jeremy D'Morley, an eminent international family lawyer, while commenting on the trend of early English cases argued that “the failure of English courts to enforce prenuptial agreements is an anachronistic peculiarity of English law that demonstrates a stubborn refusal to adapt the law to new conditions”.<sup>149</sup> Morley’s research indicated that English society had changed dramatically and the Hyman principle over time no longer held good in the context of English society. He further contended that “The old precedents that held that binding prenuptial

<sup>139</sup> Law Commission (United Kingdom), *Matrimonial Property Agreements*, Consultation Paper No. 198, Part 4 (2011).

<sup>140</sup> Radmacher v. Granatino, (2010) UKSC 42 ¶3; Christopher Sharp QC, *Pre and Post-Nuptial Agreements—Increasingly Relevant?*, April 29, 2009, available at <https://fdocuments.in/document/29th-christopher-sharp-qc-st-johns-chambers-christopher-sharp-qc-st-johns.html> (Last visited on June 15, 2019).

<sup>141</sup> Matrimonial Causes Act, 1973, §§21-25 (United Kingdom).

<sup>142</sup> Westmeath v. Westmeath, (1830) 6 ER 619; Cocksedge v. Cocksedge, (1844) 60 ER 351; Cartwright v. Cartwright, (1853) 43 ER 385; H v W (1857) 69 ER 1157.

<sup>143</sup> Cocksedge v. Cocksedge, (1844) 60 ER 351.

<sup>144</sup> Hyman v. Hyman (1929) AC 601.

<sup>145</sup> *Id.*

<sup>146</sup> Matrimonial Causes Act 1973, §§34-36 (United Kingdom).

<sup>147</sup> Tekait Mon Mohini Jemadai v. Basanta Kumar Singh, (1901) ILR 28 Cal 751; Krishna Aiyar v. Balammal, (1911) ILR 34 Mad 398; Thirumal Naidu v. Rajammal Alias Rajalakshmi, (1967) 2 MLJ 484; Sribataha Barik v. Musamat Padma, AIR 1969 Ori 112.

<sup>148</sup> A.E. Thirumal Naidu v. Rajammal alias Rajalakshmi, (1967) 2 MLJ 484, ¶¶7-9.

<sup>149</sup> Jeremy D. Morley, *Enforceable Pre-nuptial Agreements: Their Time has Come*, 36 FAMILY LAW JOURNAL 772 (2006).

agreements are contrary to public policy have still not been buried. Now is the time to do so. Public policy demands it”.<sup>150</sup> Thus, in his assessment public policy in England had evolved to approve the idea of prenuptial agreements.

The truth of Morley’s proposition was demonstrated when the Law Society of England, in 2006, observed that the courts in England were showing an increasing willingness to respect agreements freely entered into between the parties, especially in relation to prenuptial agreements.<sup>151</sup> Yet there appeared to be some regression in the legal stance when, in 2008, when in the case of *MacLeod v. MacLeod*,<sup>152</sup> the Privy Council observed that public policy objections to post-nuptial agreements would not apply and declared post-nuptial agreements to be valid but at the same time also held that public policy objections to prenuptial agreements would remain intact.<sup>153</sup>

It was only in 2010 with the passing landmark judgment by the Supreme Court of the United Kingdom in *Radmacher v. Granatino*,<sup>154</sup> that the status of prenuptial agreements in England underwent a significant change. The court here outlined three factors to make prenuptial (and postnuptial) agreements binding on the prospective spouses. Firstly, the agreement should be freely entered into, that is the agreement should not be agreed to under any influence or pressure. Secondly, significance of the agreement should be clear and there should be total financial disclosure. Thirdly, there should not be circumstances under which it would be unfair to give effect to the terms of agreement under prevailing conditions, the determination of which has to be based on need, compensation and sharing at the time of separation.

While the ruling in this case does not result in prenuptial agreements becoming binding in every situation in England, it ensures that a logical agreement can have decisive strength with courts being guided by the agreement clauses. The courts in England, however, retain the autonomy to uphold the fairness of an agreement on a case to case basis. Notably, in most cases, intentions of the parties during signing of the agreement have been critically analysed to determine their validity, though sole reliance has generally not been placed on them while passing orders.

In *Z v. Z*,<sup>155</sup> Moor J. provided the wife with 40 percent of total assets on the basis of the ‘needs’ principle and not purely on the terms of agreement. Judgments of Ormrod LJ. are valuable resources to understand the broader view of the term ‘need’ in this context. In the case of *Page v. Page*,<sup>156</sup> it was held that “...‘needs’ can be regarded as equivalent to ‘reasonable requirements, taking into account the other factors such as age, health, length of marriage and standard of living’”. Further, in the *Preston v. Preston*,<sup>157</sup> his proposition was that “...the word ‘needs’ in §25(1)(b) (of the Matrimonial Causes Act, 1973) in relation to the other provisions in

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<sup>150</sup> *Id.*

<sup>151</sup> See LAW SOCIETY OF ENGLAND AND WALES, FAMILY LAW PROTOCOL (2nd ed., 2006).

<sup>152</sup> *MacLeod v. MacLeod*, (2008) UKPC 64.

<sup>153</sup> *Id.*, ¶36.

<sup>154</sup> *Radmacher v. Granatino*, (2010) UKSC 42.

<sup>155</sup> *Z v. Z*, (2011) EWHC 2878.

<sup>156</sup> *Page v. Page*, (1981) 2 FLR 198, 201.

<sup>157</sup> *Preston v. Preston*, (1982) 1 All ER 41.

the subsection is equivalent to ‘reasonable requirements’, having regard to the other factors and the objective set by the concluding words of the subsection.”

In *V v. V*,<sup>158</sup> Charles J. placed much weightage on individual autonomy where the parties have freely and knowingly entered into an agreement. He departed from the principle of equal division of assets and exercised his statutory discretion to give effect to the terms of the prenuptial agreement. On the other hand, in *Y v. Y*,<sup>159</sup> her Ladyship Roberts J. concluded that non-matrimonial property should not be considered during sharing of assets.<sup>160</sup> Here, she did not give any weight to the premarital agreement and followed §25 of the Matrimonial Causes Act, 1973 as it was found that the agreement could not fulfil the wife’s needs. Further, in *Luckwell v. Limata*,<sup>161</sup> Holman J. stressed that the court would ultimately decide the property division arrangements and not the parties to the agreement. He further held that gender based biasness should be avoided by the court as in a given situation the wife might be dependent on the husband or *vice versa*.

Evidently, though there has been general recognition of prenuptial agreements by the British judiciary, it is difficult to predict whether a particular agreement shall be given effect by the court. The English Law Commission has sought to address this uncertainty surrounding prenuptial and postnuptial agreements.<sup>162</sup> The Commission had commented that marital agreements cannot be considered to be contracts and as such cannot be enforced so as to take away the right of the courts to pass necessary orders.<sup>163</sup>

As per the Law Commission spouses could only ask the court to issue orders which reflected the agreement terms and in fact, the English Supreme Court had expressed its intention to comply with this view unless the agreement was found to be unfair.<sup>164</sup> Thus, people were sought to be made aware that their prenuptial agreements “may not be enforced” if their terms are found to be contrary to the “court’s views about fairness”.<sup>165</sup> In turn, it is expected that prospective spouses will depend on legal advice to prepare well drafted agreements which can withstand the scrutiny of English courts. Legal advisors, however, in light of the current situation, cannot know with certainty what would be the actual outcome in spite of their competency in drafting prenuptial agreements.

The Law Commission of United Kingdom published its final report on this matter on February 27, 2014.<sup>166</sup> The Commission proposed that there should be no differentiation

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<sup>158</sup> *V v. V*, (2011) EWHC 3230.

<sup>159</sup> *Y v. Y*, (2014), EWHC 2920.

<sup>160</sup> *Id.*, ¶111.

<sup>161</sup> *Luckwell v. Limata*, (2014) EWHC 502.

<sup>162</sup> Law Commission (United Kingdom), *Matrimonial Property, needs and agreements: the future of financial orders on divorce and dissolution, Executive Summary*, ¶¶1.26, 1.27 (2014), available at [http://www.lawcom.gov.uk/app/uploads/2015/03/lc343\\_matrimonial\\_property\\_summary.pdf](http://www.lawcom.gov.uk/app/uploads/2015/03/lc343_matrimonial_property_summary.pdf) (Last visited on June 18, 2019).

<sup>163</sup> *Id.*, 7.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Law Commission (United Kingdom), *Matrimonial Property, Needs and Agreements*, Consultation Paper No. 343, February 27, 2014.

between marital partnership and civil partnership.<sup>167</sup> It was observed that the courts had done sought to endorse “marital property agreements” within “the statutory framework” but only imposition of new legislation would make it possible to implement agreements without involvement of the courts.<sup>168</sup> In order to overcome this barrier, the report contained a draft bill proposing that prospective spouses be permitted to prepare a Qualifying Nuptial Agreement (‘QNA’) to delineate asset distribution in case divorce.<sup>169</sup>

However, the QNA suggested would not restrict the court’s power so far financial needs of both parties and the children are concerned. The Law Commission reported that “an agreement which leaves a spouse or former spouse without reasonable provision for income, housing, and the other elements that family lawyers understand as ‘needs’, (would) continue to be subject to the courts’ control”.<sup>170</sup> The term ‘financial needs’ was not clarified by the Law Commission and the Commission requested Family Justice Council<sup>171</sup> to clarify the same. The Council published its report in this regard in April 2016.<sup>172</sup>

Subsequently, on May 26, 2016, a Private Member’s Bill was introduced by Baroness Deech with an intention to provide for proper financial settlement provisions under the law by amending the Matrimonial Causes Act, 1973.<sup>173</sup> On January 27, 2017 Baroness Deech described how passing of the Bill would improve the situation in England.<sup>174</sup> Notably, Baroness Buscombe while replying for the government stated that “we are currently considering proposals from the Law Commission on binding nuptial agreements with safeguards not present in the Bill”<sup>175</sup> and the government would respond “in due course in the context of...wider plans for family law and system reform”.<sup>176</sup> This Private Member’s Bill went forward with its Second Reading, was examined by a Committee of the House of Commons,<sup>177</sup> and had completed its third reading in the House of Lords as of December 19, 2018.<sup>178</sup> Whether the component concerning consideration of prenuptial agreements as binding subject to some conditions, which is contained in the Bill will finally take effect and if so in what legislative form is to be seen.

<sup>167</sup> *Id.*, ¶1.6.

<sup>168</sup> *Id.*, ¶1.34.

<sup>169</sup> *Id.*, Appendix A, 181; *id.*, ¶¶5.1-7.66.

<sup>170</sup> *Id.*, ¶5.3.

<sup>171</sup> *Id.*, ¶1.27.

<sup>172</sup> Family Justice Council, *Sorting out Finances on Divorce*, April 2016, available at <https://www.judiciary.gov.uk/wp-content/uploads/2016/04/fjc-financial-needs-april-16-final.pdf> (Last visited on June 15, 2019).

<sup>173</sup> Divorce (Financial Provision) Bill 2017-19, HL Bill 310, available at [https://publications.parliament.uk/pa/bills/cbill/2017-2019/0310/cbill\\_2017-20190310\\_en\\_1.htm](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0310/cbill_2017-20190310_en_1.htm) (Last visited on June 17, 2019).

<sup>174</sup> Divorce (Financial Provision) Bill (HL): Second Reading, January 27, 2017, available at [https://hansard.parliament.uk/Lords/2017-01-27/debates/D2A8E873-A6D0-42FB-8138-3C6114A1EDD4/Divorce\(FinancialProvision\)Bill\(HL\)](https://hansard.parliament.uk/Lords/2017-01-27/debates/D2A8E873-A6D0-42FB-8138-3C6114A1EDD4/Divorce(FinancialProvision)Bill(HL)) (Last visited on June 17, 2019), ¶947.

<sup>175</sup> *Id.*, ¶962.

<sup>176</sup> Ministry of Justice, *Report on the implementation of Law Commission proposals*, January 12, 2017, 14, ¶50, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/582679/implementation-of-law-commission-proposals-report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/582679/implementation-of-law-commission-proposals-report.pdf) (Last visited on June 15, 2019).

<sup>177</sup> Catherine Fairbairn, *Pre-nuptial agreements*, HOUSE OF COMMONS LIBRARY, Briefing Paper No.03752, June 21, 2017.

<sup>178</sup> Parliament of United Kingdom, Divorce (Financial Provision) Bill (HL) 2017-19, available at <https://services.parliament.uk/bills/2017-19/divorcefinancialprovision.html> (Last visited on June 18, 2019).

Thus, we observe that English law has moved far away from its original conservative position and is now apparently on the verge of giving binding status to prenuptial agreements in matters of divorce. The Indian scenario is also changing, though at a slower pace. Contrary to various earlier judgments,<sup>179</sup> courts in cases like *Sandhya Chatterjee v. Salil Chatterjee*<sup>180</sup>, *Commissioner of Income Tax v. Mansukhrai More*<sup>181</sup> and *Sunita Devendra v. Sitadevi Deshprabhu*<sup>182</sup> have found marital agreements to be valid. Moreover, the relatively recent proposal of the Indian Ministry of Women and Child Development to ensure legality of prenuptial agreements in order to recognise rights of a divorced woman in property division, maintenance and child custody<sup>183</sup> is definitely a positive step towards securing women's rights in marital relationships.

### B. PRENUPTIAL AGREEMENTS IN THE UNITED STATES OF AMERICA

While the position of prenuptial agreements is still taking shape in England, the position in this respect in the United States of America can be said to be quite stable. Prenuptial agreements are enforceable in all fifty states of the United States, although the nature of such agreement and procedural requirements prescribed for them varies from state to state.<sup>184</sup>

The National Conference of Commissioners on Uniform State Laws prepared the Uniform Premarital Agreement Act ('UPAA') in 1983 which has been adopted by 26 states and the District of Columbia till now.<sup>185</sup> The other states either have their own statutes or impose general procedural requirements on prenuptial agreements.<sup>186</sup> In spite of varying provisions for such agreements between the states, some common prerequisites exist across states which are to be fulfilled to make legally binding prenuptial agreements. These basic requirements are that there should be full and fair disclosure of assets of both parties, and the agreement must be accomplished voluntarily, must not be unconscionable, should be entered into with access to independent legal consultation, should be executed well before the wedding, and should not be against public policy.<sup>187</sup>

It is an accepted proposition that prenuptial agreements originating out of marital relationships are distinct in substance from purely commercial agreements.<sup>188</sup> Therefore, in determining the enforceability of prenuptial agreements, states normally consider the basic

<sup>179</sup> *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh*, (1901) ILR 28 Cal 751; *Krishna Aiyar v. Balammal*, (1911) ILR 34 Mad 398; *Thirumal Naidu v. Rajammal Alias Rajalakshmi*, (1967) 2 MLJ 484; *Sribataha Barik v. Musamat Padma*, AIR 1969 Ori 112.

<sup>180</sup> *Sandhya Chatterjee v. Salil Chandra Chatterjee*, AIR 1980 Cal 244.

<sup>181</sup> *Commissioner of Income Tax v. Mansukhrai More*, (1988) 75 CTR (Cal) 101.

<sup>182</sup> *Sunita Devendra Deshprabhu v. Sitadevi Deshprabhu*, 2016(6) BomCR 567.

<sup>183</sup> *Shalini Nair, WCD draft policy seeks review of personal laws*, THE INDIAN EXPRESS, May 5, 2016, available at <http://indianexpress.com/article/india/india-news-india/wcd-draft-policy-seeks-review-of-personal-laws-2784884/> (Last visited on June 18, 2019).

<sup>184</sup> Amberlynn Curry, *The Uniform Premarital Agreement Act and its Variations throughout the States*, 23 JOURNAL OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS 355, 356 (2010).

<sup>185</sup> Jeremy D. Morley, *Uniform Premarital Agreement Act*, THE LAW OFFICE OF JEREMY D. MORLEY, available at <http://www.internationalprenuptials.com/uniform-prenuptial-agreements-act.html> (Last visited on June 17, 2019).

<sup>186</sup> *Id.*

<sup>187</sup> Uniform Premarital and Marital Agreements Act, 2013, §9 (United States of America).

<sup>188</sup> Chelsea Biemiller, *The Uncertain Enforceability of Prenuptial Agreements: Why the "Extreme" Approach in Pennsylvania is the Right Approach for Review*, 6 DREXEL L. REV. 147 (2013).

requirements stipulated above. Though the primary goal of such requirements is to safeguard the weaker spouse, this goal may fail substantially if the unequal bargaining power of the weaker part is not taken into consideration.<sup>189</sup> Scholars have warned that unequal bargaining levels prevalent among prospective spouses can translate to incredibly high involuntariness levels in entering prenuptial agreements.<sup>190</sup> Substantially higher bargaining power of one party can in turn make the prenuptial agreement unfair.<sup>191</sup>

Prenuptial agreements, in majority of the cases, protect the spouse whose assets flourish during marriage or who has a considerably larger amount of assets in comparison to other partner at the time of marriage.<sup>192</sup> These individuals usually have more financial and legal maturity and more access to legal professionals which can help them to carve out agreements which are disproportionately beneficial for them.<sup>193</sup> Moreover, differences in education level, business intelligence, resettlement issues, and pregnancy concerns may also tilt the power balance.<sup>194</sup> The impact of this power imbalance is reflect in the decision of the California Supreme Court in the *In Re Marriage of Bonds* case,<sup>195</sup> which upheld a premarital agreement although the wife did not have any legal counsel at the time of entering into the agreement, English (the language of the agreement) was not the wife's native language, and the husband had extensively large amount of assets, on the ground that the couple had agreed to keep their assets separate during marriage.<sup>196</sup>

Such power imbalance has been recognised by the UPAA drafters<sup>197</sup> who have emphasised on the element of voluntariness in prenuptial agreements. Yet, the question remains as to whether enough has been done given that unenforceability of such agreements is considered only when there is deviation in terms of traditional factors like fraud and duress.<sup>198</sup> In fact, the legal position is worth further problematising, given that there is no standard definition of voluntariness in the state statutes or in the UPAA and assessment of voluntariness is only based on study of circumambient circumstances which requires traditional evidences of fraud, duress or unreasonable pressure.<sup>199</sup> The potency of the issue in this regard can be discerned from the verdict in *Simeone v. Simeone*,<sup>200</sup> where the wife was unemployed with no asset of her own whereas the husband was sixteen years older with substantial assets. While it was contended that the husband's attorney had pressured the wife by threatening to cancel the marriage and thereby

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<sup>189</sup> Brix, *supra* note 119.

<sup>190</sup> J. Thomas Oldham, *With All My Worldly Googs I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades*, 19 DUKE J GENDER L & POL'Y 115, 125 (2011); *In re Marriage of Bonds*, 5 P.3d 831 (Cal. 2000).

<sup>191</sup> Sarah Kennedy, *Ignorance is Not Bliss: Why States Should Adopt California's Independent Counsel Requirement for the Enforceability of Prenuptial Agreements*, 52 FAM. CT. REV. 713(2014).

<sup>192</sup> See Oldham, *supra* note 190, 90.

<sup>193</sup> See Brix, *supra* note 119.

<sup>194</sup> *In re Estate of Hollett*, 94 834 A.2d 349 (N.H. 2003); *Mallen v. Mallen*, 622 S.E.2d 812, 814 (Ga. 2005).

<sup>195</sup> *In re Marriage of Bonds*, 5 P.3d 816, 817, 819, 837, 838 (Cal. 2000).

<sup>196</sup> *Id.*, 815, 823-24.

<sup>197</sup> National Conference of Commissioners on Uniform State Laws, *Proceedings in Committee of the Whole, Premarital Agreement Act*, 71, 73 (July 23-26, 1983).

<sup>198</sup> Oldham, *supra* note 190, 89.

<sup>199</sup> *Id.*, 88.

<sup>200</sup> *Simeone v. Simeone* (1990), 581 A.2d 162 (Pa. 1990).

induced her to sign the prenuptial agreement, the Supreme Court of Pennsylvania held that she had signed voluntarily.

Furthermore, the developing jurisprudence in this regard indicates that unlike business relationships where the responsibility of the proponent of the agreement is to prove the enforceability of the agreement,<sup>201</sup> in the United States, it is the responsibility of the opponent to prove unenforceability of the prenuptial agreement.<sup>202</sup>

Thus, the present standard for voluntariness and unconscionability as it stands can arguably be viewed as inadequate. The system has been framed in such a manner that the stronger party does not have any responsibility to clarify the rights being waived by the weaker party. Further, as the requirement of disclosure is improperly restricted to information about financial status,<sup>203</sup> the present standards for prenuptial agreements can also be said to permit circumventing of the prerequisites of knowledgeable waiver or waiver based on informed consent.

However, arguably this problem can be solved if the law were to mandate engagement of independent counsel by both parties and written documentation of the expected after effect of such agreements. It would then be easier for the courts to assume that the waiver of a right is knowledgeable.<sup>204</sup> In fact, in order to overcome the legal situation which has developed, the state of California focuses on examination of access to independent legal counsel, time between agreement and marriage, explanation of the terms and basic effect of the agreement as well as the rights and obligations one was giving up by signing the agreement, and traditional defences like duress, fraud, or undue influence while determining whether a prenuptial agreement was entered into voluntarily.<sup>205</sup>

As in India, for a prenuptial agreement to be valid in the United States, it should not be against public policy. This public policy requirement makes the agreement void if for instance, it restricts necessities of children, as this would amount to disturbing the right of a third party.<sup>206</sup> It may also operate in another manner with it being normal in most of the state jurisdictions, for a widow to be given a ‘forced share’<sup>207</sup> of the husband’s estate under public policy concerns as a “token of the solemnity of the matrimonial union”.<sup>208</sup> In fact, in certain scenarios due to this orientation of the law, it can become difficult to distinguish between death and divorce rights when prenuptial agreements are enforced.<sup>209</sup>

Juxtaposing this against the India position, we find that in India unlike in the United States, there is no legislation based administration of such agreements. As stated earlier, in India, prenuptial agreements if viewed in terms of their contractual character would ideally be

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<sup>201</sup> *Yarbrough v. Kirkland*, 548 S.E.2d 670, 673 (Ga. Ct. App. 2001).

<sup>202</sup> *Oldham*, *supra* note 190, 84.

<sup>203</sup> *Id.*, 121.

<sup>204</sup> *See id.*, 122.

<sup>205</sup> California Family Code, 2005, § 1615 (C) (United States of America).

<sup>206</sup> *Alves v. Alves*, 262 A.2d 111(D.C. 1970).

<sup>207</sup> Terry J. Turnipseed, *Why Shouldn't I be Allowed to Leave My Property to Whomever I choose at my Death? (or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 782 (2006).

<sup>208</sup> *In re Estate of Geyer*, 433 A.2d 423, 429 (Pa. 1985).

<sup>209</sup> *See Turnipseed*, *supra* note 207, 83; *Posner v. Posner*, 233 So. 2d 381, 384 (Fla. 1970).

regulated by §10 of the Indian Contract Act, 1872 and may be void if they are against public policy as per §23 of the Contract Act.<sup>210</sup> The questions of what is good for public interest and what may be harmful for the broader societal framework would definitely be concerns of public policy. Given that the public policy concept in India is gradually changing, it is hoped that suitably drafted prenuptial agreements would not be viewed as being violative of public policy under the present day situation where large numbers of prospective spouses are demonstrating an interest in opting for such agreements to safeguard their interests.<sup>211</sup> We submit that liberal understanding of public policy such as in the United States will in fact aid in giving beneficial effect to prenuptial agreements, as required.

### C. PRENUPTIAL AGREEMENTS IN CANADA

In contrast to the American position, in Canada, the Divorce Act, 1985 does not demand that premarital agreements be fulfilled but instead considers such agreements, as factors to be taken into account on divorce, such as while determining quantum of child support or spousal support to be awarded.<sup>212</sup> In matters pertaining to child custody in the event of divorce, Canadian courts tend to approve prenuptial conditions so long it is for the maximum benefit of the child.<sup>213</sup> Moreover, though as a general rule, community property law of equitable distribution of assets prevails in all provinces of Canada,<sup>214</sup> courts usually seek to honour the provisions agreements relating to proprietary division between the prospective spouses. The importance regarded to prenuptial agreements in the Canadian context is arguably attributable to legal recognition of marriage contracts under the Family Law Act, 1990.<sup>215</sup>

It is worth noting that Canadian states have sought to achieve a balance in relation to the legal effect given to prenuptial agreements. Notably, in British Columbia, even in the presence of a valid marriage contract, courts have the power to divide assets with due regard to principles of fairness.<sup>216</sup> Similarly, redistribution of assets can be undertaken by courts in Saskatchewan, if the marriage contract is found to be unconscionable or unfair at the time that it was agreed upon.<sup>217</sup> Fraud, unconscionability and undue harshness of the prenuptial agreement on one party are also viewed as serious grounds allowing for setting aside of the agreement itself in Nova Scotia.<sup>218</sup> Other grounds for setting aside of such agreements include but are not limited

<sup>210</sup> Indian Contract Act, 1872, §23 (India).

<sup>211</sup> Dilsad Bilimoria, *Prenuptial agreements: building a safety net around assets*, LIVE MINT, January 21, 2016, available at <http://www.livemint.com/Money/ngLavHhlUeaCqDN2xoqa2K/Prenuptial-agreements-building-a-safety-net-around-assets.html> (Last visited on June 21, 2019); *Parting Shot*, THE TELEGRAPH, April 4, 2012, available at [https://www.telegraphindia.com/1120404/jsp/opinion/story\\_15332562.jsp#.T32fB3k3PIV](https://www.telegraphindia.com/1120404/jsp/opinion/story_15332562.jsp#.T32fB3k3PIV) (Last visited on June 16, 2019).

<sup>212</sup> Divorce Act, R.S.C. 1985, 15.2(4) (Canada).

<sup>213</sup> John C. Soby, Q.C. & Alicia T. DuBois, *An Overview of Pre-Nuptial Agreements in Canada*, INTERNATIONAL ACADEMY OF MATRIMONIAL LAWYERS, available at [http://www.iaml.org/library/iaml\\_journal/back\\_issues/volume\\_1/an\\_overview\\_of\\_pre\\_nuptial\\_agreements\\_in\\_canada/index.html#Ref4](http://www.iaml.org/library/iaml_journal/back_issues/volume_1/an_overview_of_pre_nuptial_agreements_in_canada/index.html#Ref4) (Last visited on June 21, 2019).

<sup>214</sup> *Id.*

<sup>215</sup> Family Law Act, R.S.O. 1990, c.F3, §52 (Canada).

<sup>216</sup> Family Law Act, SBC-2011, Ch.25, §93 (Canada).

<sup>217</sup> Family Property Act, S.S. 1997, Ch. F-6.3, §24(2) (Canada).

<sup>218</sup> Matrimonial Property Act, R.S.N.S. 1989, Ch. 275, §29 (Canada).

to the absence of independent legal advice as recognised in New Brunswick<sup>219</sup> and non-disclosure of significant liabilities or assets by either party as taken into account in Ontario.<sup>220</sup>

The operation of prenuptial agreements in the Canadian context can be best understood through reference to some significant cases. In *Hartshorne v. Hartshorne*<sup>221</sup> ('Hartshorne') both the wife and husband were lawyers and the wife left her legal practice to raise their children. In their prenuptial agreement both had agreed to keep their assets separate. However, it was also provided that the wife would get a three percent interest in the matrimonial home for each year, subject to accrual of maximum of 49 percent. The agreement also provided for waiver of spousal support. Both the parties had consulted lawyers independently in this instance and were themselves trained lawyers. When the parties separated after nine years of marriage, as per agreement, the wife was supposed to receive \$2,80,000 whereas the husband was supposedly entitled to \$1.2 million. The husband contended that the prenuptial agreement should prevail whereas the wife opined that the agreement should not be enforced since it would cause unfairness in the division of assets as per §65(1) of the British Columbia Family Relations Act, 1996 (presently §93 of the Family Law Act, 2011).

The Family Relations Act recognised division of assets at the time of dissolution of marriage as per prenuptial agreements, provided that such agreements operated fairly at the time of distribution.<sup>222</sup> In case of lack of fairness, judicial apportionment of the assets would be made under the Act.<sup>223</sup> In the factual circumstances of this case, it was found that the husband had several assets at the time of marriage, whereas the wife was heavily in debt. Taking this into account, the Supreme Court of Canada held that the unequal division sought as per the prenuptial agreement was not unfair as each of the spouses had brought properties to the marriage differently and equal division of the assets would be unfair. Accordingly, the court ordered apportioning of the family assets in a ratio of 60:40, in favour of the husband.

Significantly, in *Miglin v. Miglin*<sup>224</sup> ('Miglin'), it was observed that the "court should be loathe to interfere with a pre-existing agreement unless it is convinced that the agreement does not comply substantially with the overall objectives of the Divorce Act."<sup>225</sup> However, it was further observed that in order to provide reasonable spousal support, the court should not simply consider only the pre-existing agreement but should also ensure that the agreement did not fail "to be in substantial compliance with the overall objectives of the (Divorce) Act".<sup>226</sup> The Supreme Court of Canada here applied a two stage test to judge the validity of the separation agreement.<sup>227</sup> The first stage is to judge based on the circumstances at the time of formation of the agreement whether there is any need to discount the application of the negotiated agreement and the second stage is to judge the original intention of the parties at the time of drafting of the agreement. After the two stage analysis, it was held in this case that

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<sup>219</sup> Marital Property Act, S.N.B. 1980, Ch. M-1.1, §41 (Canada).

<sup>220</sup> Family Law Act, R.S.O. 1990, Ch. F.3., §56(4) (Canada).

<sup>221</sup> *Hartshorne v. Hartshorne*, (2004) 236 D.L.R. (4th) 193 (S.C.C.).

<sup>222</sup> Family Relations Act, RSBC 1996, §56, 61, 64 (Canada).

<sup>223</sup> *Id.*, §65.

<sup>224</sup> *Miglin v. Miglin*, (2003) 1 S.C.R. 303, 2003 SCC 24 (S.C.C.).

<sup>225</sup> *Id.*, ¶46.

<sup>226</sup> *Id.*, ¶78.

<sup>227</sup> *Id.*, ¶79-90.

the husband's claim seeking enforcement of spousal support waiver would not be granted as it could not meet the two stage criteria.

Further, the British Columbia Court of Appeal in the case of *N. (D.K.) v. O. (M.J.)*,<sup>228</sup> has held that "an agreement may be unfair as contemplated by §65(1) not only in its formation, but in its operation". Logically, a prenuptial agreement might be fair at the time of its formation but its impact at the time of its operation, i.e. after separation might not be same as anticipated. It is thus, the duty of the courts to ascertain the fairness of the premarital agreement at the time of its application for division of assets. In keeping with this, *Rooney v. Rooney*<sup>229</sup> addressed the issues associated with the waiver of spousal support as per prenuptial agreement, with the Supreme Court of Newfoundland and Labrador rejecting the waiver clause of the agreement in question on the basis that the wife was not aware of the negative consequences she might have to face in the event of divorce while signing.

In *Loy v. Loy*,<sup>230</sup> the Ontario Superior Court of Justice further elucidated on issues relating to waiver of property and spousal support in prenuptial agreements. In this case, the wife was fifty-five years old and hailed from South Africa while the husband was sixty-nine years. It was the second marriage for the couple. Neither of them furnished financial information and though advised, the wife did not take independent legal advice. Their marital agreement was subsequently revised and thereafter, the wife expressed the desire to cancel the agreement on the basis of insufficient disclosure. Referring to the cases of *Miglin*,<sup>231</sup> *Hartshorne*,<sup>232</sup> *Rosen v. Rosen*,<sup>233</sup> and *LeVan v. LeVan*,<sup>234</sup> the court stated that the prenuptial agreement can be rejected only when the present circumstance is significantly different from that anticipated during signing of the agreement. On this basis, the court refused to set aside the marriage contract and spousal waiver agreed upon in the agreement, as the claimant could not bring her situation within the enumerated sub-clauses under §56(4) of the Family Law Act. In a similar vein, in *Mastalerz v. Mastalerz*,<sup>235</sup> also the Court of Queen's Bench of Alberta upheld the validity of terms of a prenuptial agreement relating to distribution of property and support waivers.

The character of the prenuptial agreement is anticipatory and may sometimes appear to be unfair, particularly when considered in the context of a long marriage. The above discussion indicates though that in Canada, when well informed prospective spouses have signed such agreements voluntarily with access to independent legal counsel, usually deference to the terms contained therein is shown by courts.

Comparing the Canadian position with India, Goa's Civil Code can be said to be similar to the Family Law Act of Canada<sup>236</sup> in terms distribution of property. Goa's Portuguese Civil Code too focuses on 'communion of assets' i.e. equal division of assets as the default rule and necessitates consent from both spouses for alienation of property consent but at the same

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<sup>228</sup> *N. (D.K.) v. O. (M.J.)*, (2003), 41 R.F.L. (5th) 142 (B.C. C.A.).

<sup>229</sup> *Rooney v. Rooney*, (2003) 230 Nfld. & P.E.I.R. 183.

<sup>230</sup> *Loy v. Loy*, (2007) CarswellOnt 7123.

<sup>231</sup> *Miglin v. Miglin* (2003) 1 S.C.R. 303, 2003 SCC 24 (S.C.C.).

<sup>232</sup> *Hartshorne v. Hartshorne*, (2004) 236 D.L.R. (4th) 193 (S.C.C.).

<sup>233</sup> *Rosen v. Rosen*, (1994) 3 R.F.L. (4th) 267 (Ont. C.A.).

<sup>234</sup> *LeVan v. LeVan*, (2006) 82 O.R. (3d) 1 (Ont. S.C.J.).

<sup>235</sup> *Mastalerz v. Mastalerz*, 2007 ABQB 416 (Alta. Q.B.).

<sup>236</sup> Family Law Act, SBC 2011, c. 25 (Canada).

time, also allows for customised separation of assets based on prenuptial agreements.<sup>237</sup> Similar to the operation of Canadian law, prenuptial agreements are legally recognised under the Civil Code in Goa for demarcating asset distribution on divorce and in the absence of such an agreement, the law relating to community property law of equal sharing of assets takes effect.

#### D. PRENUPTIAL AGREEMENTS IN CHINA

Prenuptial agreements are legally enforceable in China and required to be in writing.<sup>238</sup> Article 19 of the Marriage Law of the People's Republic of China, 2001 specifies that

“The husband and the wife may conclude an agreement that the property acquired by them during the period in which they are under contract of marriage and the property acquired before marriage shall be in their respective possession separately or jointly or part of the property shall be in their possession separately and the other part jointly.”<sup>239</sup>

It is important to note that the rate of divorce in China is increasing.<sup>240</sup> During the first half of the year 2017 about 1.9 million couples got divorced, indicating more than ten percent rise in comparison to divorce rate for the same period a year earlier.<sup>241</sup> At the same time, data has indicated that less than 5 percent couples in China were annually opting for prenuptial agreements.<sup>242</sup> China holds a community property regime and in the absence of any prenuptial agreement, in most cases, the property is divided equally.<sup>243</sup> In spite of this, low rates of use of prenuptial agreements continue, possibly due to perceptions of bad luck and fear or distrust of such agreements among the lower middle income category.<sup>244</sup>

Moreover, there is no explicit guidance on how Article 19 could be practically applied, what should be the essential terms, and how specification of division of assets should be made, possibly adding to the muted popularity of prenuptial agreements. An interpretation of the marriage law by the Supreme People's Court of China can however, be viewed as key guidance regarding division of assets, with the court stating that the house purchased before marriage is a

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<sup>237</sup> Pamela D' Mello, *Uniform Civil Code: Goa Shows the Way*, INDIA LEGAL, Panaji, November 3, 2016, available at <http://www.indialegalive.com/cover-story-articles/il-feature-news/goa-leading-by-example-15447> (Last visited on June 18, 2019).

<sup>238</sup> Marriage Law of the People's Republic of China, 2001, Art. 19 (China).

<sup>239</sup> *Id.*

<sup>240</sup> Guo Ka, *Calling it quits: Divorce rate jumps 6%*, CHINA DAILY, July 12, 2016, available at [http://www.chinadaily.com.cn/china/2016-07/12/content\\_26055052.htm](http://www.chinadaily.com.cn/china/2016-07/12/content_26055052.htm) (Last visited on June 18, 2019).

<sup>241</sup> Coco Liu, *What's stopping the Chinese from saying 'I do' to a Prenup?* October 21, 2017, available at <http://www.scmp.com/week-asia/society/article/2116319/whats-stopping-chinese-saying-i-do-prenup> (Last visited on June 18, 2019).

<sup>242</sup> Cheng Yingqi, *Survey: Chinese reluctant about prenups*, CHINA DAILY, May 12, 2011, available at [http://www.chinadaily.com.cn/china/2011-05/12/content\\_12493357.htm](http://www.chinadaily.com.cn/china/2011-05/12/content_12493357.htm) (Last visited on June 23, 2019).

<sup>243</sup> *The Common Property under China Marriage Law*, HG LEGAL RESOURCES, available at <https://www.hg.org/legal-articles/the-common-property-under-china-marriage-law-18614> (Last visited on June 18, 2019).

<sup>244</sup> LIU, *supra* note 241.

personal property and will be retained after divorce but the mortgage amount paid by the non-mortgagee during marriage would have to “be paid back by the real-estate owner”.<sup>245</sup>

Women in China give birth to children, educate them and devote substantial time and effort on family chores.<sup>246</sup> Lack of recognition of such invisible contribution of the women of the family and their latent contribution towards the development of the asset base of the family is definitely problematic. This is indeed exacerbated by the existing judicial instruction of not splitting property on divorce and instead awarding assets to the individual whose name is reflected on the deed,<sup>247</sup> especially because women in China have traditionally been prone to having lesser share of assets when compared to their male counterparts.<sup>248</sup> This disparate situation makes it particularly relevant for Chinese women to insist on balanced prenuptial agreements.

When compared to mainland China, the status of prenuptial agreements in Hong Kong is not well established and these agreements do not have strong statutory footings. §7 and §14 of the Matrimonial Proceedings and Property Ordinance<sup>249</sup> of Hong Kong, which provides guidelines to judges for issuance of orders related to divorce suits, remain silent about premarital agreements.

Hong Kong was a former British colony and was returned back to China in 1997 as per the 1984 agreement between China and Britain.<sup>250</sup> Resultantly, Hong Kong courts have traditionally acted in accordance with the English law in family law issues. In the case of *LKW v. DD*,<sup>251</sup> the Hong Kong Court of Final Appeal referred to the English case of *White v. White*,<sup>252</sup> and laid down the 50-50 rule of property division. Further, in *SPH v. SA*,<sup>253</sup> the Hong Kong Court of Final Appeal opined that the Radmacher decision<sup>254</sup> of the United Kingdom Supreme Court “should also be regarded as the law in Hong Kong”, which may perhaps be considered to indicate a tacit embracement of the validity of prenuptial agreement within the jurisdiction.

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<sup>245</sup> Supreme People’s Court, Interpretation (III) of the Supreme People’s Court of Several Issues on the Application of the Marriage Law of the People’s Republic of China, August 2011; Qiao Hong, *New Interpretation of Chinese Marriage Law sparks loud debate*, 17(6) CONFUCIUS INSTITUTE MAGAZINE (2011), available at <http://confuciusmag.com/new-chinese-marriage-law-sparks-loud-debate> (Last visited on June 21, 2019).

<sup>246</sup> Frank Zhao, *Chinese Women Still Outworking Men at Home*, WOMEN OF CHINA, available at <http://www.womenofchina.cn/womenofchina/html1/survey/1411/2106-1.htm> (Last visited on June 14, 2019).

<sup>247</sup> Tania Branigan, *For richer, for poorer: how China’s laws put women second*, THE GUARDIAN, February 24, 2015, available at <https://www.theguardian.com/world/2015/feb/24/chinese-women-equality-laws-land-housing> (Last visited on June 19, 2019).

<sup>248</sup> See also Wen Jing Deng, *Why women own less housing assets in China? The role of intergenerational transfers*, 34(1) JOURNAL OF HOUSING AND THE BUILT ENVIRONMENT 1-22 (2019).

<sup>249</sup> Matrimonial Proceedings and Property Ordinance, Cap. 192, July 1, 1972, available at <https://www.elegislation.gov.hk/hk/cap192/en> (Last visited on June 21, 2019) (China).

<sup>250</sup> *Chronology: Timeline of 156 years of British rule in Hong Kong*, REUTERS, June 28, 2007, available at <https://www.reuters.com/article/us-hongkong-anniversary-history/chronology-timeline-of-156-years-of-british-rule-in-hong-kong-idUSSP27479920070627> (Last visited on June 17, 2019).

<sup>251</sup> *LKW v. DD*, (2010) 13 HKCFAR 537.

<sup>252</sup> *White v. White*, (2001) 1 A.C. 596.

<sup>253</sup> *SPH v. SA*, (2014) FACV 22/2013.

<sup>254</sup> *Radmacherv.Granatino*, (2010) UKSC 42.

The status of the prenuptial agreements in India is quite similar to that of Hong Kong. In absence of any law on prenuptial agreements in India, it is also difficult for couples who have entered into prenuptial agreements to anticipate the court's verdict if a divorce case is initiated in an Indian court. It is noteworthy that while China has legalised prenuptial agreements, it is only popular within the younger generation and in big cities whereas older generation and countryside people usually rely on traditional beliefs.<sup>255</sup> Whether the same trend is replicated in the Indian context would have to be determined on the basis of empirical evidence.

#### E. PRENUPTIAL AGREEMENTS IN TURKEY

Turkey is a secular country where about 99 percent population is formally Muslim.<sup>256</sup> There is no State religion in Turkey,<sup>257</sup> and the Turkish Constitution ensures religious tolerance and freedom of religion.<sup>258</sup> Turkish civil law permits prospective couples to enter into premarital agreement related to marital property.<sup>259</sup> Under Turkish law, the distribution of assets in the event of separation or divorce is regulated by the marital asset regime,<sup>260</sup> which can take two forms, namely legal asset regime and contractual asset regime.

The first category is the legal asset regime, which operates by default in the absence of any agreement, where assets acquired during marriage are shared equally irrespective of contribution from each spouse.<sup>261</sup> This is also called “participation in acquired property” regime.<sup>262</sup> The acquired assets in this respect may be comprised of salary or wages received, payments received from social security institutions, disability compensations, personal assets gained after the marriage and other assets that capable of substituting acquired assets.<sup>263</sup>

The second category of matrimonial asset regime as per the Turkish Civil Code (‘TCC’) has three subtypes from which the parties have to make a selection in order to make a valid prenuptial agreement. These subtypes pertain to the regime of separation of property, the regime of shared separation of property and the regime of community property. The prenuptial

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<sup>255</sup> Zhang Xian Chu, *Prenuptial Agreements in China*, INTERNATIONAL ACADEMY OF FAMILY LAWYERS, available at [https://www.iafl.com/library/iaml\\_law\\_journal/back\\_issues/volume\\_1/prenuptial\\_agreements\\_in\\_china/index.html](https://www.iafl.com/library/iaml_law_journal/back_issues/volume_1/prenuptial_agreements_in_china/index.html) (Last visited on June 19, 2019).

<sup>256</sup> Harvard Divinity School, *Islam in Turkey*, RELIGIOUS LITERACY PROJECT, available at <https://rlp.hds.harvard.edu/faq/islam-turkey> (Last visited on June 18, 2019).

<sup>257</sup> Bureau of Democracy, Human Rights and Labor, *2014 Report on International Religious Freedom, Turkey*, October 14, 2015, available at <https://www.state.gov/j/drl/rls/irf/2014/eur/238442.htm> (Last visited on June 17, 2019).

<sup>258</sup> Bureau of Democracy, Human Rights and Labor, U.S. Department of State, *Turkey— International Religious Freedom Report 2004*, available at <https://www.state.gov/j/drl/rls/irf/2004/35489.htm> (Last visited on June 20, 2019).

<sup>259</sup> Mert Yelcin, *Turkish Family Law: Court System & Jurisdiction*, MONDAQ, July 26, 2018, available at <http://www.mondaq.com/turkey/x/722614/divorce/Turkish+Family+Law+Court+System+Jurisdiction> (Last visited on June 18, 2019).

<sup>260</sup> Z.D. Tarman & B. Başoğlu, *Matrimonial property regime in Turkey*, 3 BUITENLANDS IPR / FOREIGN PIL 357-363 (2014).

<sup>261</sup> *Id.*

<sup>262</sup> Turkish Civil Code, Law No. 4721, O.G. No. 24607, 8 December 2001, Art. 202 (Turkey).

<sup>263</sup> *Id.*, Art. 219.

agreements under this regime have to be executed either before the notary or be declared before the marriage officer specifying the regime they are pursuing.<sup>264</sup>

Freedom of contract is one fundamental doctrines of Turkish law.<sup>265</sup> Turkish family law, however, restricts such freedom as the prospective spouses can only enter into an agreement within the ambit of marital property regime.<sup>266</sup> The couple can only select from with the established statutory regimes namely the regime of separation of property with distribution, the regime of community of property, regime of participation in acquisitions and the regime of separation of property.<sup>267</sup> Spouses are only allowed to choose either from the legal asset regime or from any of the three types of contractual asset regimes and they are not permitted to create their own property regimes or opt for multiple property regimes.<sup>268</sup>

The regime of separation of property subtype may be imposed by the court under certain extraordinary circumstances as noted under Articles 206, 209 and 210 of TCC or it may be accepted through an agreement between the spouses.<sup>269</sup> There are two types of assets under this regime, one is assets of the wife and the other is assets of the husband. Articles 242 and 243 of TCC specify the legal parameters of this regime whereas Articles 276 and 277 guide the spouses' proportionate distribution of assets in the event of dissolution of marriage.<sup>270</sup>

The subtype of regime of shared separation of property was the brainchild of the Turkish lawyers and stemmed from the separation of property regime regulated by the marital property regime of "participation in acquisitions".<sup>271</sup> It is a middle-path choice stipulated by the Articles 244 to 255 of TCC where the assets attained or investments made by one party for the future interest of the family will be shared equitably in case of dissolution of marriage.<sup>272</sup>

In the community of property regime subtype, the properties are grouped under three categories, namely the wife's assets, the husband's assets and joint assets. Unlike under the legal regime, here spouses may have shared property rights.<sup>273</sup> This regime is laid down under Articles 256 to 281 of TCC and during dissolution of property regime due to divorce or separation, the couple can determine the property distribution on the basis of their personal property and common property.<sup>274</sup>

Unlike Turkey, prenuptial agreements in general are not legally binding in relation to property matters at all instances under general Indian law. Nonetheless, like the Turkish Civil

<sup>264</sup> *Id.*, Art. 205.

<sup>265</sup> Onur Alper & Irem Bulut, *Freedom of Contract*, available at [http://www.goksusafiisik.av.tr/Articletter/2011\\_Fall/GSI\\_Articletter\\_2011\\_Fall\\_Article1.pdf](http://www.goksusafiisik.av.tr/Articletter/2011_Fall/GSI_Articletter_2011_Fall_Article1.pdf) (Last visited on June 19, 2019).

<sup>266</sup> Turkish Civil Code, Art. 203 (Turkey).

<sup>267</sup> Tarman, *supra* note 260.

<sup>268</sup> M DURAL et al, *TURKISH PRIVATE LAW, FAMILY LAW, Vol. III*, 10 (2005); Ş. ŞİPKA, *THE PROPERTY REGIME OF PARTICIPATION IN ACQUISITIONS AND ISSUES RELATED TO ITS APPLICATION*, 20 (2011).

<sup>269</sup> DURAL, *id.*, 305; ŞİPKA, *id.*, 35.

<sup>270</sup> See Oldham, *supra* note 190.

<sup>271</sup> F. ACAR, *THE FAMILY HOME-PROPERTY REGIME-THE LEGAL DISTRIBUTIVE SHARE OF THE SPOUSE* 309 (2012); DURAL, *supra* note 268, 418.

<sup>272</sup> Mary Lou O'Neil & Sule Toktas, *Women's Property Rights in Turkey*, 15(1) *TURKISH STUDIES* 29-44 (2004).

<sup>273</sup> ACAR, *supra* note 271, 333; DURAL, *supra* note 269, 426.

<sup>274</sup> Turkish Civil Code, Art. 277 (Turkey).

Code, Goa's Civil Code only allows prenuptial agreements restricted to property division, and other issues related to marital agreements which fall under their purview are not considered. The legal asset regime under TCC is similar to the system of the property distribution which is followed under Goa's Civil Code in the absence of prenuptial agreements. However, an important distinction between the two is that the prenuptial agreements under Goa's Civil Code cannot not be easily changed or revoked but the matrimonial property regime under TCC can be modified at any moment before or during the marriage through an agreement under the provisions of the law.<sup>275</sup>

## V. CONCEPTUALISING MODEL PRENUPTIAL AGREEMENTS FOR INDIA

It is apparent from the above discussions that in regimes where they are enforced, prenuptial agreements by their very nature are meant to give autonomy to spouses, as adult persons having requisite competence to manage their own affairs. Now, the question arises as to whether this 'autonomy' of spouses should be fully respected or if spouses should be 'protected' in case the terms of the agreement seek to go beyond the established law. 'Autonomy' in this context should be understood to mean freedom of the spouses to bypass default rules under law through execution of a prenuptial agreement whereas 'protection' refers to presence of the checks and balances to ensure individual security.

Such questions, on the validity of agreements like these, have been raised effectively by renowned family law scholar, Leong Wai Kum, stating,

“Should the autonomy of spouses, who are undoubtedly adult persons with the requisite capacity to regulate their own affairs, not be fully respected so that it is purely a matter of how to hold them to their agreement? On the other hand, should spouses be held to their agreement if its terms on division of matrimonial assets or maintenance fall short of what developed law would have the court order?”<sup>276</sup>

In this regard, it is important to note that legal scholar and established commentator on legal philosophy Prof. Brian Bix, while narrating the fundamental concept behind private ordering has stated that “individuals know better than do other people (including those in government) what is in their own best interests”.<sup>277</sup> We argue that it follows that since spouses are going to have to cohabit and coexist in the course of their marriage, and suffer the consequences of lapses on each other's part, it would be better to allow them to make choices of the terms governing their relationship instead of allowing third parties including the State to impose default rules on them. Nevertheless, we recognise that in certain special cases where there are chances of either spouse being exploited due to their circumstances, it may be beneficial to allow the government to mandate certain special clauses to ensure equal bargaining capacity for both spouses.

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<sup>275</sup> DURAL, *supra* note 269, 301; SIPKA, *supra* note 269, 19.

<sup>276</sup> Leong Wai Kum, *The Law in Singapore on Rights and Responsibilities in Marital Agreements*, 10 SING JLS 108 (2010).

<sup>277</sup> Brian Bix, *Private Ordering and Family Law*, 23 J AM ACAD MATRIMONIAL LAW 251 (2010).

It is an established fact that productivity of a family depends on the roles played by each individual spouse.<sup>278</sup> However, it is difficult to measure the inputs of each spouse made to collectively produced marriage goods like children and household “because tasks (are) generally unmonitored and output realised long after the inputs were provided. Hence individuals ha(ve) incentive to shirk in the production of these goods.”<sup>279</sup> Thus, it is relevant that in the present day, individuals are arguably more aware than others, including judges, about the role they want for themselves and their spouse within the marriage and are capable of framing their expectations from their spouses in terms of what would be likely to deliver optimum results for them in respect of their marital relation.<sup>280</sup>

It is precisely this autonomy of individuals that is sought to be upheld by means of prenuptial agreements and it may thus, indeed be justified to look for assurance that premarital agreements are made legally enforceable in India. In fact, this position is supported by the manner in which the key traditional objections towards implementation of prenuptial agreements on the public policy ground have now come under judicial scrutiny in nations such as the United Kingdom (from which India derived much of its public policy narrative against prenuptial agreements) on account of becoming “obsolete”.<sup>281</sup> If viewed from a renewed perspective therefore, the existence of a prenuptial agreement could surely be seen as being capable of encouraging cohabitants in India to enjoy the benefits of a formalised marriage relationship, given that it provides a safety net which can help ease their concerns relating to the potential of future spousal claims.<sup>282</sup>

Looking at the treatment of prenuptial agreements abroad, we find that though prenuptial agreements are considered to be lawful in various jurisdictions including but not limited to United States of America, Canada, South Africa, Australia and New Zealand,<sup>283</sup> in each of these states, “the courts have retained full power to scrutinise”<sup>284</sup> agreement conditions.<sup>285</sup> This judicial position is significant given that it is undeniable that the exercise of autonomy of one individual can potentially curb the autonomy of the other individual, with the danger of opportunism existing in any mode of contract including prenuptial agreements.

Prof. Robert Leckey, through his scholarship on family law, agrees that the relational contract theory of marriage acknowledges “the potential for serious inequality in intimate relations”.<sup>286</sup> Scholars have also suggested that “prenuptial agreements overwhelmingly hurt women by virtue of their inferior bargaining power”.<sup>287</sup> The adjudicating court, in exercise

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<sup>278</sup> See Elizabeth Brake, *Marriage and Domestic Partnership*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, July 11, 2009, available at <https://plato.stanford.edu/entries/marriage/> (Last visited on June 16, 2019).

<sup>279</sup> Gillian Hamilton, *Property Rights and Transaction Costs in Marriage: Evidence from Prenuptial Contracts*, 59 THE JOURNAL OF ECONOMIC HISTORY, 76 (1999).

<sup>280</sup> *Id.*, 14.

<sup>281</sup> *Radmacher v. Granatino*, (2010) UKSC 42, ¶52.

<sup>282</sup> See Brigitte Clark, *Should Greater Prominence Be Given to Pre-Nuptial Contracts in the Law of Ancillary Relief?*, 16(4) CHILD AND FAMILY LAW QUARTERLY 399, 400 (2004).

<sup>283</sup> Richard Todd, *The Inevitable Triumph of the Ante-Nuptial Contract*, 36(7) FAM LAW 545 (2006).

<sup>284</sup> Jeremy D Morley, *Enforceable Pre-nuptial Agreements: Their Time Has Come*, 36(4) FAM LAW 770 (2006).

<sup>285</sup> *Id.*

<sup>286</sup> Robert Leckey, *Relational Contract and Other Models of Marriage*, 40 OSGOODE HALL LAW JOURNAL 7 (2002).

<sup>287</sup> Allison A Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STANFORD LAW REVIEW 887 (1997).

of its authority to evaluate the terms of a prenuptial agreement, should thus, focus on the identification of such inequalities and aim to extend adequate protection for the weak and vulnerable spouse.<sup>288</sup>

Evidently, prenuptial agreements should not be allowed to be managed by either party in an absolutistic manner and at the same time inflexible rules under law governing such agreements cannot be a reasonable option. We argue that there should be an attempt by the State to establish a hybrid legal standing, ensuring balance between absolute autonomy and absolute protection, while dealing with prenuptial agreements. Individuals must possess autonomous capacity to execute prenuptial agreements but simultaneously the law must continue to administer 'safety nets' in order to ensure provision of adequate protections to those in need.

While discussions regarding the legalisation of prenuptial agreements have taken centre stage for long, the form and content of such prenuptial agreements arguably require substantial consideration in the Indian context. In this Part therefore, we seek to identify components of feasible prenuptial agreements, keeping in view the issues specific to India. In this respect, we first analyse the possibility of modifying the standard form of the Islamic prenuptial agreement, the *nikahnama* by negotiating the incorporation of terms meant to benefit Muslim women. Thereafter, we discuss the types of clauses that prospective spouses from other religious communities could consider including in their prenuptial agreements to safeguard their interests.

Although it is true that Indian legislations do not make specific references to marital contracts unlike several other jurisdictions discussed earlier, it is worth noting that the Indian judiciary has time and again given credence to prenuptial agreements and negotiated terms contained therein. Resultantly, we are optimistic that unless the terms of a prenuptial agreement are framed in a manner which would directly be viewed as opposed to public policy, it is likely that due regard will be given to prenuptial agreements by courts when adjudicating relevant matrimonial matters, with there being potential for lower courts to take such agreements into account at least in the form of persuasive evidence indicating the intentions of spouses relating to their marital life.

#### A. VIEWING THE NIKAHNAMA AS AN INSTRUMENT FOR THE BENEFIT OF MUSLIM WOMEN

For long, the *nikahnama* has been considered to be a traditionally and legally legitimate agreement entered into prior to a Muslim marriage,<sup>289</sup> thereby making it an accepted form of prenuptial agreement in India. As mentioned earlier, the utility of prenuptial agreements can fall prey to unequal bargaining levels existing between prospective spouses. The *nikahnama* too is arguably exposed to this pitfall, particularly in case of marriages where the wife is likely to

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<sup>288</sup> See Ajmal Azam, *Prenup ruling could lead to exploitation of vulnerable*, THE GUARDIAN, October 20, 2010, available at <https://www.theguardian.com/law/2010/oct/20/radmacher-prenup-ruling-analysis> (Last visited on June 17, 2019).

<sup>289</sup> Gopika Solanki, *The Campaign Around Nikahnama: Reforms from Within* in ADJUDICATION IN RELIGIOUS FAMILY LAWS: CULTURAL ACCOMMODATION, LEGAL PLURALISM, AND GENDER EQUALITY IN INDIA 136 (1st ed., 2011).

occupy a disadvantaged position within the context of the family.<sup>290</sup> Yet, we argue that by utilising the contractual nature of the *nikahnama*,<sup>291</sup> the situation can be modified tactfully so as to provide the wife with equal rights within the marriage alongside necessary safeguards. If drafted adequately so to support equality and other virtuous ideals within a Muslim marriage, such a *nikahnama* can potentially even serve as a model for prenuptial agreements to be emulated by members of other religious communities, once they are able to navigate their personal laws to find space for prenuptial agreements within their marital spheres.

It is important in this context to begin by considering how Muslim traditions envision equality for the wife within the marital relation. Notably, the doctrine of *kafa'ah* in marriage under Islamic law envisions equality between a husband and wife, and in fact requires a husband to “measure up” to his wife.<sup>292</sup> The doctrine further specifies that as a union between two families, marriage requires the wife’s family to set the ‘standard for equality’.<sup>293</sup> In pursuance of this abstract objective of providing Muslim women with equal rights as their husband in marriage, some scholars have advocated fine tuning the terms within a *nikahnama* so as to make them gender just.<sup>294</sup>

They argue that as a contract demarcating the rights of both spouses within a Muslim marriage, the composition of a *nikahnama* can not only encourage the prospective couple to discuss and determine the nuanced features of their prospective marital life but also provide an avenue for wives to tackle issues of oppression within the marriage which are in certain ways condoned by the practices within the religion.<sup>295</sup> Additionally, it is to be noted that certain Islamic scholars view the *nikahnama* as an instrument symbolising the autonomy and rights and Islamic women, and consider it as being capable of being empowering for Muslim brides, based on the nature of the terms stipulated in it.<sup>296</sup>

Among the stipulations that can be included in a Muslim marriage contract, the responsibility of the husband to maintain his wife, being recognised as an objective of marriage,<sup>297</sup> is generally expressly mentioned within a *nikahnama*.<sup>298</sup> However, it is those stipulations which though beneficial for Muslim brides remain conventionally unmentioned in

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<sup>290</sup> Uzma Naheed, *Nikahnama: a problem or solution?*, THE MILLI GAZETTE, May 31, 2005, available at <http://www.milligazette.com/Archives/2005/16-31May05-Print-Edition/163105200564.htm> (Last visited on June 22, 2019).

<sup>291</sup> Audrey D’Mello, *The sacrament of pre-nups*, THE DECCAN HERALD, December 7, 2015, available at <http://www.deccanchronicle.com/151207/commentary-op-ed/article/sacrament-prenups> (Last visited on June 22, 2019).

<sup>292</sup> Farhat J. Ziadeh, *Equality (Kafa’ah) in the Muslim Law of Marriage*, 6 THE AMERICAN JOURNAL OF COMPARATIVE LAW 509 (1957).

<sup>293</sup> *Id.*, 510.

<sup>294</sup> A. Suneetha, *Muslim Women and Marriage Law: Debating the Model Nikahnama s*, 47(43) ECONOMIC & POLITICAL WEEKLY 41 (October 27, 2012).

<sup>295</sup> Nahal Toosi, *Marriage Contract a Tool for Muslim women’s rights*, THE LOWELL SUN, August 26, 2006, available at [http://www.lowellsun.com/religion/ci\\_4243218](http://www.lowellsun.com/religion/ci_4243218) (Last visited on June 23, 2019).

<sup>296</sup> Hadia Mubarak, *Muslim Marriage Contracts: Female Agency and Autonomy*, BERKLEY FORUM, December 3, 2014, available at <https://berkeleycenter.georgetown.edu/forum/muslim-marriage-contracts-female-agency-and-autonomy> (Last visited on June 22, 2019).

<sup>297</sup> SYED AMEER ALI, *MOHAMMEDAN LAW*, Vol .II 405 (5th ed. 1988).

<sup>298</sup> Muhammad Munir, *Stipulations in a Muslim Marriage Contract with Special Reference to Talaq Al-Tafwid Provisions in Pakistan*, 12 Y.B. ISLAMIC & MIDDLE E. L. 235 (2005-2006).

texts of modern Islamic law which raise debates among scholars. While on one hand, conservative scholars seek to resist the incorporation of novel and liberal terms within Muslim marital contracts citing strict adherence to Islamic traditions, on the other hand, progressive scholars seek to support the inclusion of such terms based on the doctrine of individual autonomy and free consent in determination and enforcement of rights and liabilities arising out of a contract.<sup>299</sup>

We support the thinking of the latter group of scholars and thereby seek to present possible clauses that a Muslim bride may choose to stipulate in her prenuptial *nikahnama* so as to safeguard her interest, both during the continuance of and after the termination of her marriage. Owing to the fact that *nikahnamas* are civil contracts, our propositions rely on the underlying understanding that any such conditions will be enforceable only if the husband agrees to them with free consent and all other essentials of a valid contract are adhered to.<sup>300</sup> We propose that it is this contractual nature of the *nikahnama* which can, subject to necessary changes within its form and content, facilitate the process of ensuring that Muslim brides are given their due entitlements without hassle and their husbands are held to their word.<sup>301</sup>

### 1. Suggested clauses for a model *nikahnama*

The issue of a model *nikahnama* has been discussed for long in India with the All India Muslim Personal Law Board, All India *Shia* Personal Law Board and All India Muslim Women Personal Law Board having presented their initial versions of model *nikahnama* more than a decade back in 2005,<sup>302</sup> 2006<sup>303</sup> and 2008<sup>304</sup> respectively.<sup>305</sup>

Each of these versions has sought to incorporate newer clauses within the traditional document so as to enhance the protection of the rights of both spouses, with specific emphasis on safeguarding the interests of Muslim wives. In the *Shariat nikahnama* devised by the All India Muslim Women Personal Law Board as part of a draft Muslim Marriage Act, provisions for compulsory registration of marriage were provided with model forms meant for facilitating the process.<sup>306</sup> As per this version, stipulations contained in the *nikahnama* were also required to be stated in both Hindi and Urdu to allow non-Urdu speaking parties to fully comprehend the effect of the document.<sup>307</sup> On the other hand, the model *nikahnama* prepared by

<sup>299</sup> *Id.*, 237, 238.

<sup>300</sup> Shamreeza Riaz, *Shariah Perspective on Marriage Contract and Practice in Contemporary Muslim Societies*, 3(3) INTERNATIONAL JOURNAL OF SOCIAL SCIENCE AND HUMANITY (May 2013).

<sup>301</sup> Nida Kirmani, *Re-thinking the Promotion of Women's Rights through Islam in India*, 42(1) IDS BULLETIN, 56 (2011); Nida Kirmani & Isabel Philips, *Engaging with Islam to promote women's rights: exploring opportunities and challenging assumptions*, 11(2) PROGRESS IN DEVELOPMENT STUDIES, 87 (2011).

<sup>302</sup> PTI, *Model Nikahnama Unveiled*, THE TIMES OF INDIA (May 1, 2005).

<sup>303</sup> Farzand Ahmed, *Triple Failure*, INDIA TODAY (December 11, 2006).

<sup>304</sup> PTI, *Muslim Women Personal Law Board unveils new 'nikahnama'*, THE HINDU (March 17, 2008).

<sup>305</sup> The model *nikahnama* has captured the attention of Islamic jurists once again in light of the judgment of the Supreme Court in *Shayara Bano v. Union of India*, (2017) 9 SCC 1. Significantly both the All India Muslim Women Personal Law Board and the All India Muslim Personal Law Board have submitted their new versions of a model *nikahnama*. Debayan Roy, *PM Modi Receives Model Nikahnama, AIMWPLB Requests for Aadhaar Link*, NEWS 18, August 12, 2017; PTI, *Model nikahnama to be modified to deter Muslims from giving triple talaq: AIMPLB*, INDIA TODAY, February 3, 2018.

<sup>306</sup> PTI, *supra* note 304.

<sup>307</sup> *Id.*

the All India Muslim Personal Law Board, in a bid to bring uniformity between marriage contracts across different sections of Islamic community, prescribed that both spouses should be provided with a copy of the agreement, whose terms could potentially provide for gold, silver or immovable property as dower and demarcate the respective roles of the spouses within the relationship.<sup>308</sup>

Additionally, jurist Ameer Ali had enumerated numerous terms<sup>309</sup> which would be enforceable under law in the context of a marital contract between a Muslim husband and wife, regulating the terms of their marital relation.<sup>310</sup> Certain other terms which if stipulated within a *nikahnama* may benefit a Muslim bride are discussed hereafter.

### 1.1. A 'no polygamy' clause

Polygamy or the practice of having multiple wives is permissible under Islamic law.<sup>311</sup> As a result of this provision for polygamy in the personal law, Muslim men in India have for long been permitted to have four wives.<sup>312</sup> Despite claims for banning polygamy among Muslims in India,<sup>313</sup> due to the lack of unanimity in this respect amongst members of the community, the situation continues to subsist either openly or in a clandestine manner with Muslim men relying on Islamic tenets to justify their multiple marriages.<sup>314</sup> It is important to note however, though permitted by religion, the Supreme Court of India has clarified that the right to enter into polygamous marriages is not an integral part of the fundamental right of a Muslim individual to profess or practice his religion.<sup>315</sup>

In the case of *Begum Subanoo v. A.M. Gafoor*,<sup>316</sup> the Supreme Court also stated that when a Muslim man takes another wife, he breaks the vows of fidelity made to his first wife and causes her marital injury. The court further stated that although a Muslim man is permitted under personal law to marry more than one wife, the provision of §125(3) of the Code of Criminal Procedure equates the second or subsequent wives as mistresses nonetheless.<sup>317</sup> Furthermore, the General Recommendations made by the Committee on the Elimination of Discrimination against Women constituted by the United Nations have highlighted the negative

<sup>308</sup> PTI, *supra* note 302.

<sup>309</sup> In relation to stipulations that a Muslim wife can provide in the matrimonial agreement, Ameer Ali suggests clauses stating that the couple shall live at a specified place and the husband shall not attempt to move the wife out of their conjugal home without her consent. Ali further suggests that other conditions which may be included in the marital contract could cover the obligation of the husband to pay a fixed maintenance to his wife or the obligation to maintain the children of the wife from a previous marriage.

<sup>310</sup> Md. Zafar Mahfooz Nomani, *Impact of Indian Secular Laws on Islamic Law of Marriages in Regard to Marital and Conjugal Rights, Dower and Maintenance: A Reformatory Perspective* in ISSUES IN WOMEN'S RIGHTS: A PRACTITIONER'S RESOURCE BOOK 270 (KM Baharul Islam, 1st ed., 2014).

<sup>311</sup> ABU AMEENAH BILAAL PHILIPS & JAMEELAH. JONES, POLYGAMY IN ISLAM, (2nd ed., 2005).

<sup>312</sup> *Qazis: A Muslim male is allowed four wives*, THE TIMES OF INDIA, April 6, 2010.

*Cf.* Rishi Iyenger, *Indian Court Says Muslims Are 'Misusing' the Quran for Polygamy*, TIME, November 6, 2015.

<sup>313</sup> PTI, *Declare polygamy in Islam illegal*, THE HINDU, March 15, 2018.

<sup>314</sup> Rohan Venkataramakrishnan, *Muslim women and the surprising facts about polygamy in India*, SCROLL.IN, July 8, 2014, available at <https://scroll.in/article/669083/muslim-women-and-the-surprising-facts-about-polygamy-in-india> (Last visited on June 23, 2019).

<sup>315</sup> *Khurshed Ahmad Khan v. State of U.P.*, (2015) 8 SCC 439.

<sup>316</sup> *Begum Subanoo v. A.M. Gafoor*, (1987) 2 SCC 28.

<sup>317</sup> *Id.*

impact that polygamy by a husband can have on his wives.<sup>318</sup> In particular, General Recommendation No. 21 emphasises that polygamy violates the constitutional rights of women in nations where equality is a constitutional right, in addition to being in violation of Article 5(a) of The Convention on the Elimination of All Forms of Discrimination against Women.

Despite the observations of the Supreme Court with respect to polygamy, there is no law in India or precedent thereof which wholly bans or renders the practice of polygamy among Muslim persons illegal. As a result, merely trusting that her husband will not marry another woman when the law does not prohibit the same may turn out to be a bad gamble for a Muslim woman in certain cases. Consequently, in order to prevent her husband from entering into a second marriage during the subsistence of their marriage, a Muslim bride should include a 'no polygamy' clause within her prenuptial agreement.<sup>319</sup> Academician Faizan Mustafa<sup>320</sup> and women's rights lawyer Flavia Agnes have pointed out how a Muslim woman historically had and presently has the right to make relevant stipulations in her *nikahnama* for the purpose of restricting polygamy.<sup>321</sup>

Additionally, according to her financial and social considerations, a prospective wife may also stipulate that contracting a second marriage by the husband during subsistence of their marriage will allow her to reside separately from her husband and make him liable to maintain her during the period she chooses to reside separately. It may also be stipulated that commission of polygamy by the husband will allow for initiation of divorce, at the option of the wife, in the form of *khula*<sup>322</sup> or *talaq-al-tafwid*, if the right thereof has been delegated.<sup>323</sup>

## 1.2. Expressly negating the need of *nikah halala*

*Nikah halala* refers to a practice in Islamic law which requires a woman to marry another man, consummate the marriage and get divorced by him before she can remarry her former husband in case she was divorced by three pronouncements.<sup>324</sup> Although triple *talaq* (*talaq-ul-biddat*) has been held to be unconstitutional,<sup>325</sup> the need for *nikah halala* has not been eliminated due to the existence of *talaq hasan* which is another form of Islamic divorce involving the husband pronouncing *talaq* thrice, each at a gap of one month and abstaining from physical intercourse with his wife for the period of the three months.<sup>326</sup> *Nikah halala* marital arrangements come with their own risks. Since conditional marriages (*mut'ah* marriages) are not

<sup>318</sup> United Nations Entity for Gender Equality and the Empowerment of Women, *General Recommendation No. 21 (13th session, 1994), Equality in marriage and family relations*, available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (Last visited on June 23, 2019).

<sup>319</sup> Flavia Agnes, *Half measure: Triple talaq forbidding marriage contract may not do Muslim women much good*, SCROLL.IN, May 28, 2017, available at <https://scroll.in/article/838518/half-measure-triple-talaq-forbidding-marriage-contract-may-not-do-muslim-women-much-good> (Last visited on June 19, 2019).

<sup>320</sup> *Id.*

<sup>321</sup> Anupama Katakam, *The divorce debate*, 21(18) FRONTLINE (Aug-Sept 2004).

<sup>322</sup> See also Maaïke Voorhoeve, *Divorce. Historical Practice* in THE OXFORD ENCYCLOPEDIA OF ISLAM AND WOMEN (Natana J. DeLong-Bas ed., 2013)

<sup>323</sup> *Tafwid* in OXFORD DICTIONARY OF ISLAM 310 (John L. Esposito ed., 2003).

<sup>324</sup> Nidhi Khare & Radhika Singh, *Halala Nikah: Marriage Against the Dignity of Muslim Women? A Critical Analysis in Light of the Indian Legal Scenario*, 4(1) HUMAN RIGHTS INTERNATIONAL RESEARCH JOURNAL (2016).

<sup>325</sup> *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

<sup>326</sup> See *id.*

permitted under *Sharia* law as per *Sunni* community,<sup>327</sup> it is possible when parties involved are *Sunni* Muslims, for the temporary husband to refuse to divorce the wife in consonance with the nature of *nikah halala*. Further, an investigation has revealed the blatant misuse of this provision in India, with *nikah halala* being offered as a ‘professional’ service for which women wanting to remedy their broken marriages are being required to pay top dollar.<sup>328</sup>

Although the legality of *nikah halala* within the sphere of *Sharia* law has been challenged,<sup>329</sup> it is undeniably an ongoing practice within the Muslim sects in India. Therefore, in order for women to prevent themselves from being exploited as a result of this abhorrent practice, it is suggested that Muslim women insist on the incorporation of a clause in the *nikahnama* specifying that remarriage with her husband post-divorce will not require the performance of *nikah halala*. The stipulation may further provide that after termination of marriage and completion of *iddat* period, the former husband and wife would be free to get married again to any competent individual including each other.

### 1.3. Clause determining and guaranteeing *mehr* in addition to maintenance

Dower or *mehr* refers to a stipulated amount that the husband is obligated to provide to his wife as a mark of respect for their marriage.<sup>330</sup> Among the two forms of dower, prompt dower is payable upon demand by the wife while deferred dower is payable at a later date on the happening of a specific event.<sup>331</sup> The *mehr* is the sole property of the wife and is a debt on the husband throughout his life and on his heirs after his death.<sup>332</sup> The objective of the dower is to provide the wife with a means of subsistence in case of death of her husband or the dissolution of marriage.<sup>333</sup>

It is to be noted that although the *mehr* is meant to provide maintenance to the wife either during the continuance or after the termination of marriage, *mehr* is not the same as maintenance. This means that a Muslim husband is required to maintain his wife both during<sup>334</sup> and after termination of marriage,<sup>335</sup> regardless of the previous payment or obligation to pay the

<sup>327</sup> Radhika Iyengar, *What is Nikah halala, how it was established and where it stands in modern India*, THE INDIAN EXPRESS, March 26, 2018, available at <http://indianexpress.com/article/what-is/what-is-nikah-halala-how-it-was-established-and-where-it-stands-in-modern-india-triple-talaq-4618415/> (Last visited on June 23, 2019).

<sup>328</sup> Sushant Pathak & Jamshed Adil Khan, *Exposed: How maulvis take money for one-night stand with divorced women trying to save marriage*, INDIA TODAY, August 16, 2017, available at <http://indiatoday.intoday.in/story/nikah-halala-islamic-scholars-one-night-stand-divorced-muslim-women-marriage/1/1027212.html> (Last visited on June 23, 2019).

<sup>329</sup> See Parbina Purkayastha, *Muslim law board endorses nikah halala, says it is quranic practice and cannot be challenged*, INDIA TODAY, July 15, 2018.

<sup>330</sup> Nilofar Ahmed, *The importance of ‘mehr’*, DAWN, June 14, 2012, available at <https://www.dawn.com/news/726611> (Last visited on June 23, 2019).

<sup>331</sup> RAKESH KUMAR SINGH, *LAW OF DOWER (MAHR) IN INDIA*, TEXTBOOK ON MUSLIM LAW (2011).

<sup>332</sup> Flavia Agnes, *Economic Rights of Women in Islamic Law*, 31(41/42) ECONOMIC AND POLITICAL WEEKLY 2832-2838 (October 12-19, 1996).

<sup>333</sup> Rakesh Kumar Singh, *Law of Dower (Mahr) in India*, 12 (1) JOURNAL OF ISLAMIC LAW AND CULTURE (2010).

<sup>334</sup> See Nisar Ahmad Ganai, *Non-Maintenance of a Muslim Wife as a Ground For Divorce*, 9 COCHIN UNIVERSITY LAW REVIEW (1981).

<sup>335</sup> See Kusum, *Maintenance of a Divorced Muslim Wife: A Critique of the Proposed Law*, 22(3) JOURNAL OF THE INDIAN LAW INSTITUTE, 408 (July-September 1980).

*mehr*. The obligation to pay dower being of the nature of a debt is substantially different from the obligation of maintenance of the wife, which is an ongoing marital duty of the husband.

In this respect, it is suggested that a Muslim bride should explicitly mention in her *nikahnama* that the obligation of the husband to maintain her is exclusive of and in addition to his duty to pay her dower so as to avoid being shortchanged later. Such a clause should specifically mention that the payment of dower, however big the lumpsum amount is, would not abrogate the right of the wife to seek maintenance from her husband during the marriage or after its dissolution.<sup>336</sup> Further, while stipulating the amount of dower in the *nikahnama*, the bride should ensure that the amount is not nominal or merely in the nature of a formality and is in fact provided in a manner which is capable of acting as a safety net, during the course of her marriage or after the end of it, as the case may be.<sup>337</sup>

#### 1.4. Determination of maintenance payable after *iddat* period

Under traditional Islamic law, a divorced wife was entitled to receive maintenance only till the *iddat* period or the end of pregnancy, if she was found to be pregnant from her marriage.<sup>338</sup> This legal position was highly disadvantageous for divorced Muslim women who would often find themselves destitute and homeless after the end of the *iddat* period.<sup>339</sup> The Supreme Court attempted to remedy the situation in the *Shah Bano* case<sup>340</sup> by providing Muslim women with a right to maintenance under §125 of the Code of Criminal Procedure. However, this progressive legal development was restricted by the introduction of The Muslim Women (Protection of Rights on Divorce) Act, 1986, which reinstated the traditional legal position.<sup>341</sup> Fortunately, the right of a divorced Muslim woman even after the completion of the *iddat* period or her pregnancy as the case may be, has once again been reinforced by the Supreme Court of India through its verdict in *Danial Latifi v Union of India*.<sup>342</sup>

As per the law laid down by the Supreme Court, ex husbands are required to ensure a reasonable and fair provision for their former wives for the period extending beyond *iddat* period.<sup>343</sup> This reasonable and fair provision is not defined by the court and is therefore, open to judicial interpretation, meaning that the provisions made in one case may differ from that of another. In order to reduce the uncertainty which such a judicial exercise necessarily entails, it is recommended that Muslim brides should specify within the prenuptial agreement, the nature of maintenance that they expect from their husbands in the period after *iddat* in case of divorce.

<sup>336</sup> C.f. Lindsey E. Blenkhorn, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and their Effect on Muslim Women*, 76(1) SOUTHERN CALIFORNIA LAW REVIEW 199 (November 2002).

<sup>337</sup> See Heather Jacobson, *The Marriage Dower: Essential Guarantor of Women's Rights in the West Bank and Gaza Strip*, 10(1) MICHIGAN JOURNAL OF GENDER AND LAW (2003).

<sup>338</sup> Tarannum Siddiqui, *Maintenance Rights in Muslim Personal Law*, 2(3) INTERNATIONAL JOURNAL OF HUMANITIES & SOCIAL SCIENCE STUDIES 161 (November 2015).

<sup>339</sup> See also Ajay Kumar, *The gathering storm*, INDIA TODAY, March 31, 1986, available at <http://indiatoday.intoday.in/story/muslim-women-protection-of-rights-on-divorce-bill-raises-too-many-shackles/1/348308.html> (Last visited on June 23, 2019).

<sup>340</sup> Mohd. Ahmed Khan v. Shah Bano Begum (1985 SCR (3) 844).

<sup>341</sup> *The Shah Bano Legacy*, THE HINDU, August 10, 2003, available at <http://www.thehindu.com/2003/08/10/stories/2003081000221500.htm> (Last visited on June 23, 2019).

<sup>342</sup> *Danial Latifi v. Union of India*, (2001) 7 SCC 740.

<sup>343</sup> *Id.*

Such stipulation can at least provide the courts with some guiding factors in making their determination.

It is suggested that the wife should stipulate specific amounts or percentages of the husband's income based on a gradation for computation of the quantum of her maintenance. For instance, the stipulation can provide that she shall be entitled to INR Y, in case her husband's income is INR Z and INR Yx2, in case her husband has an income increment equivalent to or greater than a set amount.<sup>2</sup> Such a stipulation could also provide for an annual increment of the maintenance amount which may be payable after divorce, so as to safeguard the financial interests of the divorcee woman in the wake of inflation.

### 1.5. Clause prohibiting *nikah mut'ah*

*Nikah mut'ah* is essentially a temporary fixed term marriage for pleasure recognised within the *Shia* community.<sup>344</sup> Initially formulated as a form of marriage for travelers, the practice continues even today, enabling Muslim men to contract a marriage for a few hours or days in order to have sexual intercourse, often for a price, without forging a long term marital bond.<sup>345</sup> While some scholars have stated that *nikah mut'ah* is essentially tantamount to prostitution,<sup>346</sup> others have vouched for its progressive role in Islam<sup>347</sup> and sought to justify its permissibility within Islamic traditions.<sup>348</sup> Owing to the fact that a *nikah mut'ah* has no minimum duration, it can range from a few minutes to a few months.<sup>349</sup> Due to the temporary nature of such marriages, these allow Muslim men to have intercourse with multiple women, who are their 'wives' at the given point of time, without being tagged as sinners.<sup>350</sup>

Evidently, the possibility of a Muslim husband contracting temporary marriages for the sake of sexual relations is not only demeaning for his wife but it can also be the cause of substantial tension within marriage, since the *mut'ah* type of 'marriage' provides the husband with the leeway to be adulterous by being sexually involved with women whom he 'marries' temporarily for that purpose. A prudent step for reducing the chances of such conflicts would be

<sup>344</sup> Naz Tooabally, *Does the Use of Mut'ah Marriage Make Purchasing Sex Halal for Muslims?*, April 24, 2015, available at <http://thewip.net/2015/04/24/does-the-use-of-mutah-marriage-make-purchasing-sex-halal-for-muslims/> (Last visited on June 23, 2019).

<sup>345</sup> Deeba Abedi, *Temporary Marriages in Islam Should Be Prohibited*, HUFFINGTON POST, January 30, 2017, available at [http://www.huffingtonpost.in/deeba-abedi/temporary-marriages-in-islam-should-be-prohibited\\_a\\_21659016/](http://www.huffingtonpost.in/deeba-abedi/temporary-marriages-in-islam-should-be-prohibited_a_21659016/) (Last visited on June 23, 2019).

<sup>346</sup> Deeba Abedi, *A Marriage Fit for Men: Islam's 'Temporary Nikahs' That Hurt Women*, THE QUINT, January 13, 2017, available at <https://www.thequint.com/voices/blogs/mikah-mutah-and-nikah-misyar-are-temporary-marriages-in-islam-that-benefit-the-man-but-not-really-the-woman> (Last visited on June 23, 2019).

<sup>347</sup> Haider, *Nikah Mut'ah: Temporary marriage in Islam is not prostitution, instead, it is freedom to both men & women*, MERI NEWS, April 26, 2017, available at <http://www.merineews.com/article/nikah-mutah-temporary-marriage-in-islam-is-not-prostitution-instead-it-is-freedom-to-both-men--women/15924635.shtml> (Last visited on June 23, 2019).

<sup>348</sup> Haider, *Nikah Mut'ah: Temporary marriage in Islam—Part I*, MERI NEWS, May 7, 2017, available at <http://www.merineews.com/article/nikah-mutah-temporary-marriage-in-islam---part-i/15924854.shtml> (Last visited on June 23, 2019).

<sup>349</sup> Nadya Labi, *Married for a Minute*, MOTHER JONES (April 2010), available at <http://www.motherjones.com/politics/2010/03/temporary-marriage-iran-islam/> (Last visited on June 23, 2019).

<sup>350</sup> Shabnam Mahmood & Catrin Nye, *I do... for now. UK Muslims revive temporary marriages*, BBC, May 13, 2013, available at <http://www.bbc.com/news/uk-22354201> (Last visited on June 23, 2019).

for the Muslim bride to specify within the *nikahnama* that the husband is prohibited from contracting marriages of such nature. Once the husband accepts the provision provided in the *nikahnama*, he will become contractually restricted from entering into a *mut'ah* marriage. In order for such a restriction to be emphatically operative though, the clause should also necessarily mention the consequences which would follow in case of violation of the restriction and the bride should choose sufficiently strict consequences to ensure there is a strong deterrent for her husband.

#### 1.6. Delineating irretrievable breakdown of marriage as a ground for divorce

Irretrievable breakdown of marriage refers to a situation where the marriage in question has broken down to such an extent that it cannot be remedied by any possible means.<sup>351</sup> It is a no fault ground of divorce recognised in many nations around the world allowing for termination of marriages which have failed to an extent where they cannot be saved, without any fault of the spouses.<sup>352</sup> The Law Commission of India has advocated the amendment of the provisions of personal laws relating to divorce in its 71st and 217th Reports so as to incorporate a provision providing for irretrievable breakdown of marriage.<sup>353</sup> So also, the Supreme Court of India has expressed the need for irretrievable breakdown of marriage to be introduced as a ground for divorce in several decisions.<sup>354</sup>

Although Islamic law is silent regarding the legality of irretrievable breakdown of marriage as a ground for divorce, owing to the contractual nature of Muslim marriages and in the absence of any indication that such a ground would be contrary to Islamic tenets, it is suggested that Muslim women may contractually stipulate for irretrievable breakdown of marriage as a ground of divorce,<sup>355</sup> which would operate in the form of *khula* or *talaq-al-tafwid*. There are indeed possibilities of using the ground of irretrievable breakdown of marriage against the interests of Muslim wives as pointed out by a research report published by Majlis in response to a proposal to introduce irretrievable breakdown of marriage as a ground for divorce.<sup>356</sup> Such possibilities though can arguably be reduced substantially by stating within the *nikahnama* that in case of either spouse seeking divorce on this ground, they will be required to sufficiently convince the court or designated authority as to why the marriage is to be considered as broken beyond repairs. Although beneficial for both spouses, in light of lack of specific legal guidance about the same, the enforcement of such a clause may admittedly be dicey.

<sup>351</sup> Vijender Kumar, *Irretrievable Breakdown of Marriage: Right of a Married Couple*, 5(1) NALSAR LAW REVIEW (2010).

<sup>352</sup> *Id.*

<sup>353</sup> Law Commission of India, *The Hindu Marriage Act, 1955—Irretrievable Breakdown of Marriage as a Ground of Divorce*, Report No. 71 (1978); Law Commission of India, *Irretrievable Breakdown of Marriage – Another Ground for Divorce*, Report No. 217 (2009).

<sup>354</sup> *Samar Ghosh v. Jaya Ghosh*, (2007) 4 SCC 511; *Ms. Jorden Diengdeh v. S. S. Chopra*, AIR 1985 SC 935; *Naveen Kohli v. Neelu Kohli*, AIR 2006 SC 1675.

<sup>355</sup> Women from other religions in India are restricted from incorporating such a clause in their prenuptial agreement due to the fact that such a no-fault ground is unavailable to them under their respective personal laws and such a clause would defeat the legislative intent of the provisions of the respective personal laws exhaustively delineating grounds for divorce.

<sup>356</sup> Majlis Legal Centre, *Irretrievable Breakdown of Marriage—Economic Safeguards for Women on Divorce*, March 28, 2011, available at [http://majlislaw.com/file/Majlis\\_IBM\\_Report\\_General.pdf](http://majlislaw.com/file/Majlis_IBM_Report_General.pdf) (Last visited on June 23, 2019).

### 1.7. Allowing for resisting restitution of conjugal rights under specific circumstances

Vaidya J. of the Bombay High Court had once famously stated that the provision for restitution of conjugal rights which allows the court to order an unwilling wife to go to her husband “is a relic of ancient times when slavery or quasi-slavery was regarded as natural”.<sup>357</sup> The concept was imported in the context of Muslim couples, in a case wherein the Judicial Committee of the Privy Council opined that in case a Muslim spouse withdraws himself or herself from the society of the other spouse without lawful cause, the spouse may seek restitution of conjugal rights.<sup>358</sup>

Owing to the fact that Muslim marriages are civil contracts, scholars posit that restitution of conjugal rights should be viewed as specific performance of contract.<sup>359</sup> Further, this legal position is sought to be shielded from attack on equitable grounds on the basis of the fact that restitution of conjugal rights in the context of Muslim marriages is to be determined according to principles of Muslim law and not equitable principles.<sup>360</sup> In order to sustain a claim for restitution of conjugal rights, a Muslim husband must prove that there was marital relation between the parties, the wife had left his company or the matrimonial home without any reasonable cause and have refused to return without just cause though the husband was willing to cohabit with her and discharge his spousal duties.<sup>361</sup>

It is noteworthy that the right of a husband to seek restitution of conjugal rights is not absolute and may be made conditional on the payment of unpaid dower or other necessary remedies that the court deems to be just and fair in the facts of a particular case.<sup>362</sup> The legality of restitution of conjugal rights has also been recently reconsidered in academic discussions based on the dimensions of privacy involved.<sup>363</sup> In pursuance of this positive judicial holding and the emerging academic position, it is suggested that Muslim brides should consider providing for a substantial quantum of their dower to be designated as deferred dower so as to allow them at least preliminary grounds for resisting restitution of conjugal rights sought by their husbands and secure maintenance at a future date in case the same has been withheld by their husbands.

They should preferably further delineate specific grounds in the *nikahnama* itself, apart from the ones provided for under the Dissolution of Muslim Marriage Act, 1939 to resist restitution on conjugal rights. These specific grounds should not be based on a basic template and brides should attempt to customise them as per their own needs. For instance, consider a Muslim bride, who is a germaphobe and detests unclean surroundings. If her husband refuses to take regular baths after their marriage or does not otherwise maintain the standard of cleanliness that she requires, she may want to ‘withdraw from his society’ and resist returning till circumstances change for the better. Since such a situation is unlikely to be covered under any of

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<sup>357</sup> Shakila Banu v. Gulam Mustafa, AIR 1971 Bom 166.

<sup>358</sup> Moonshee Buzloor Ruheem v. Shumsoonissa Begum, (1867) 11 MIA 551

<sup>359</sup> Gaurav Mehta, *Restitution of Conjugal Rights* in MUSLIM LAW, UNIVERSAL'S MASTER GUIDE TO JUDICIAL SERVICE EXAMINATION (2010).

<sup>360</sup> Abdul Kadir v. Salima, (1886) ILR 8 All 149.

<sup>361</sup> Mohammad Amjad v. Mrs. Sarah @ Sonia Dhir, Court of Civil Judge 5 (South), Saket, New Delhi, ML No. 11/10 (May 30, 2011).

<sup>362</sup> Anis Begum v. Mohd. Istefa, (1892) 14 All 429.

<sup>363</sup> Gautam Bhatia, *The Constitution and the Public/Private Divide: T. Sareetha vs Venkatasubbaiah*, SSRN, July 30, 2017, available at <https://ssrn.com/abstract=3010972> (Last visited on June 23, 2019).

the grounds of the Dissolution of Muslim Marriage Act, 1939 including cruelty, the bride would benefit from including a condition in her *nikahnama* stipulating that the husband will not be able to seek restitution of conjugal rights unless he remedies the situation if she ‘withdraws from his society’ on grounds of lack of cleanliness or absence of daily hygiene.

### 1.8. Delegation of right to divorce to the wife

*Talaq-e-tafwid* refers to the delegation of the right to divorce by a Muslim husband to his wife.<sup>364</sup> *Talaq-e-tafwid* operates as a contractual term between the husband and the wife which may be provided for within the *nikahnama*<sup>365</sup> and enables the wife to divorce herself from her husband without seeking intervention from a court of law.<sup>366</sup> Some scholars suggest that this delegation of right to divorce does not need to be affected only by virtue of the *nikahnama* and may be included in a later document by the husband who consents to such delegation.<sup>367</sup>

Once a complete delegation takes place, the husband is not permitted to revoke such delegation, since the right essentially vests in his wife.<sup>368</sup> The wife is capable of exercising this right at any time after the arising of specified contingencies and the mere non-exercise of this right immediately after the occurrence of the contingent event does not reduce the effect of this right vested in her.<sup>369</sup> The husband while delegating the right to divorce is required to stipulate the nature of circumstances in which the right will be exercisable, and if the right to divorce is rightly exercised by the wife on account of one of the stipulated circumstances, *talaq-e-tafwid* is valid.<sup>370</sup> In specific cases, depending on the nature of the stipulations, divorce may automatically take effect based on the husband’s conduct, if they conform to any of the contractually prohibited acts.<sup>371</sup>

In view of the fact that *talaq-e-tafwid* provides a Muslim woman with the freedom of divorcing herself from her husband in a system which has traditionally favoured the ability of husband to determine when he shall ‘free’ his wife from the shackles of their marital bond, we advocate that Muslim brides should consider insisting on the incorporation of a provision for *talaq-e-tafwid* in the *nikahnama* itself, so as to begin the marriage with equal bargaining power, at least in respect of divorce. The stipulations for operation of *talaq-e-tafwid* should be seriously considered by the bride and she should negotiate the incorporation of necessary preconditions on the satisfaction of which her right will crystallise. Further, brides should insist on the inclusion of such a condition in the *nikahnama*, i.e. prior to their marriage, so as to safeguard their own interests within the marital relation and reduce the chances of being exploited. Matters pertaining to the nature and quantum of maintenance, in addition to the rights and obligations of the spouses in case the wife divorces herself, should be clearly stipulated in

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<sup>364</sup> TALAQ-I-TAFWID: THE MUSLIM WOMAN’S CONTRACTUAL ACCESS TO DIVORCE: AN INFORMATION KIT (Lucy Carroll & Harsh Kapoor ed., 1996).

<sup>365</sup> Suneetha, *supra* note 294, 45.

<sup>366</sup> Suroj Mia v. Abdul Majid, 1953 CriLJ 1504.

<sup>367</sup> Sufia Khanam, *Talaq-I-Tafwid and its Application in Context of Bangladesh: An Analytical Approach*, 21(7-V) IOSR JOURNAL OF HUMANITIES AND SOCIAL SCIENCE 34 (July 2016).

<sup>368</sup> Sainuddin v. Latifannessa Bibi, 1919 ILR 46 Calcutta 141.

<sup>369</sup> *Id.*

<sup>370</sup> Badarannissa Bibi v. Mafiattala, 7 Bengal Law Reports 442.

<sup>371</sup> *See* Muhammad Amin v. Mst. Aimna Bibi, AIR 1931 Lahore 134.

the *nikahnama* to reduce the scope for ambiguities in case of exercise of *talaq-e-tafwid* at a later stage.

While acknowledging the benefit that may accrue in this regard, at the same time, we express our reservations regarding the concept of divorce without intervention of courts. It is evident that automatic divorce on the happening of certain contingencies or the complete discretion of the wife in the matter of divorce which is enabled by *talaq-e-tafwid* can be quite problematic in various instances. For instance, a husband D may be extremely emotionally attached to his prospective wife E and therefore, stipulate in specific terms in the *nikahnama* that his wife can exercise *talaq-e-tafwid* in case he is unable to fulfill her material wishes after marriage. In such a case, if after marriage E demands a designer handbag from D, who is unable to provide her with the same due to it being priced beyond his financial means, E may potentially threaten to divorce D.

In order to ensure balance in such cases, it is suggested that the terms allowing for exercise of *talaq-e-tafwid* should be as specific as possible. Moreover, the *nikahnama* should provide the husband with the opportunity to challenge the divorce before a court of law on the demonstration of adequate reason to resist the effecting of such divorce. In such cases, in order to safeguard the interests of the wife, at least in the initial stage, the divorce may be deemed to be valid, with the burden of proving otherwise being on the husband.

#### B. POTENTIAL CLAUSES FOR A PAN-INDIA MODEL OF PRENUPTIAL AGREEMENT

As evident from the previous section, a number of clauses can potentially be made a part of prenuptial agreements so as to benefit a married Muslim woman in the long term. It is accepted that on account of their nature, the accrual of such benefits will be subject to the male fiancé, as a contractual party, accepting these terms as part of the *nikahnama*. Nevertheless, it remains important to recognise the right of Muslim women, as contractual equals to their husbands, to stipulate necessary conditions and freely negotiate their *nikahnama*.<sup>372</sup>

Unfortunately, due to the non accordance of a uniformly legal status to prenuptial agreements amongst other communities in India, the accrual of benefits on the inclusion of such provisions in marital contracts by members of other communities, particularly among Hindus,<sup>373</sup> is dependent on judicial benevolence. Nevertheless, even at this stage, though asserting that prenuptial agreements are legal and enforceable contracts for couples from all non-Islamic communities may be difficult,<sup>374</sup> prenuptial agreements can indeed be viewed as Memorandums of Understanding where the spouses mutually determine the rights and obligations that they would like to respect through the course of their marital life.

It is acknowledged that the enforcement of such clauses may substantially be based on trust between the spouses and their respect for promises made to each other, given that there is no certain guideline regarding how prenuptial agreements will be treated by Indian courts. Nevertheless, given that these two elements are deemed to be crucial to the success of any

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<sup>372</sup> See Flavia Agnes, *Contrast 'pre-nups' with a conditional 'nikahnama'*, THE ASIAN AGE, August 28, 2018.

<sup>373</sup> The usage of the term Hindu in this context is meant to encompass Buddhist, Jain and Sikh communities also.

<sup>374</sup> Although such an assertion can be made in relation to Christian couples, in light of Divorce Act, 1869, §40 (India).

marriage,<sup>375</sup> it is hoped that they shall help to give effect to the essence contained within the prenuptial agreements which are entered into by Indian couples.

It is in light of this, that we propose that having a signed document of the nature of a prenuptial agreement, regardless of enforceability, can allow couples to be transparent about their expectations from each other and thereby strengthen the marital bond. From a purely policy perspective, we argue that documents similar to prenuptial agreements may potentially benefit married couples in the long term in understanding the scope of their relationship during marriage and facilitate the demarcation of assets and privileges in case of termination of marriage. From a legal perspective, it is possible to consider a situation where conditions for validity of a contract are fulfilled with respect to a prenuptial agreement, except for certain terms which seek to impinge on legal protections or create oppressive circumstances within a marriage. In such a situation, if such conflicting terms are severable from the rest of the agreement, the agreement can arguably be held to be legally enforceable.

In this Part, we enlist some types of terms that couples may consider incorporating within their prenuptial agreements, so as to enable customisation of the document to suit their needs. As reference to previous Parts of this paper will demonstrate, the determination of legality of terms of a prenuptial agreement in India is dependent on the facts of each case and the subjective interpretation of the adjudicator, meaning that there is no straightforward formula which can be used to determine whether a specific term in a prenuptial agreement will be held to be a contractually valid term by a court of law.

Nonetheless, in this paper, we do not aim to reiterate the oft cited arguments supporting the legal recognition of prenuptial agreements,<sup>376</sup> although we acknowledge legal acceptance as an underlying premise for the fulfillment of the objectives of prenuptial agreements. Instead we seek to provide a perspective as to the manner in which prenuptial agreements can help spouses, if they are given legal effect in India. Therefore, the types of terms enumerated hereafter are meant to be an illustrative guide for the types of terms which a prospective couple may consider including within documents, which they view as prenuptial agreements with the intention of being bound by them.

### 1. Clauses related to assets

Assets, both movable and immovable, form an important part of the corpus of any household.<sup>377</sup> At the time of marriage, couples often pool together their separate properties to

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<sup>375</sup> Maria Fatima & M. Asir Ajmal, *Happy Marriage: A Qualitative study* 10(1) PAKISTAN JOURNAL OF SOCIAL AND CLINICAL PSYCHOLOGY, 37-42 (2012).

<sup>376</sup> Aarefa Johari, *Is India really ready for prenuptial agreements, ask divorce lawyers*, SCROLL.IN, November 20, 2015, available at <https://scroll.in/article/770445/is-india-really-ready-for-prenuptial-agreements-ask-divorce-lawyers> (Last visited on June 23, 2019); Tushar Gupta, *Three States of Marriage: Time For Urban India To Debate Prenuptial Agreements*, SWARAJYA, March 3, 2018, available at <https://swarajyamag.com/culture/three-states-of-marriage-time-for-urban-india-to-debate-prenuptial-agreements> (Last visited on June 23, 2019); Poonam Agarwal, *'Prenup' Vital to Safeguard Women's Interests: MWCD*, THE QUINT, April 13, 2016, available at <https://www.thequint.com/news/india/exclusive-or-prenup-vital-to-safeguard-womens-interests-mwcd> (Last visited on June 23, 2019).

<sup>377</sup> Betsey Stevenson, *The Impact of Divorce Laws on Marriage-Specific Capital*, 25 JOURNAL OF LABOUR ECONOMICS 75-94 (2007).

form a consolidated holding for common use during the course of their marriage.<sup>378</sup> Joint assets may also be created, such as joint bank accounts,<sup>379</sup> or acquired, such as a family house or car, during the subsistence of marriage.<sup>380</sup> While the joint enjoyment of such property by the spouses is considered to be natural during happier times in a marriage, contentions may arise at a later point of time in case of marital conflict between the couple, death of either spouse or divorce.<sup>381</sup> This can be particularly true in cases where one spouse contributes wholly or substantially more to the commonly used property *vis-à-vis* the other spouse.

In order to avoid future issues pertaining to distribution, possession or title as to property either brought into marriage by a spouse or acquired in the course of marriage, both individually or jointly, it is suggested that the couple should enter a prenuptial agreement clearly delineating the dynamics of property relations that shall exist between them with regard to joint marital property and separate personal property.<sup>382</sup> Particular emphasis may be provided to provisions involving the nature of division of property in the case of divorce.<sup>383</sup> In case a spouse wishes to keep any personal property separate from the pool of marital assets, it would be wise to specifically mention such intention in the prenuptial agreement. A prudent practice in this regard would also be to provide details of all properties owned prior to marriage which are sought to be maintained as separate property, in the form of a schedule to the prenuptial agreement.

Additionally a spouse should ensure that there is no comingling of this separated property with marital assets, in order to avoid claims from the other spouse regarding the asset at a later point of time.<sup>384</sup> For instance, if Mr. X (to be married to Ms. Y) has an apartment in Gurugram which he wishes to keep separate from his marital assets, he should not only mention such intention in his prenuptial agreement with Ms. Y, but he should also ensure that he does not use marital assets to upgrade, expand, repair and/or pay off loans taken on the apartment. It is to be kept in mind that in case of utilisation of marital assets in relation to separate property, a spouse may risk comingling of separate property with marital property, which may eventually make the separate property open to a claim by the other spouse due to the difficulty in determination as to the precise contours of the separate property and the property on which marital assets have been used.

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<sup>378</sup> See T.H. Lyngstad et al, *Pooling of economic resources: A comparison of Norwegian married and cohabiting couples*, 27(5) EUROPEAN SOCIOLOGICAL REVIEW 624-635 (2011).

<sup>379</sup> See Yangtao Huang et al, *To pool or not to pool? Trends and predictors of banking arrangements within Australian couples*, 14(4) PLoS One (2019), available at <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0214019#pone.0214019.ref001> (Last visited on June 23, 2019).

<sup>380</sup> See also *Should couples jointly own property?*, PUNCH, July 2, 2017, available at <https://punchng.com/should-couples-jointly-own-property/> (June 23, 2019).

<sup>381</sup> Alessandra Voena, *Divorce laws and the economic behavior of married couples*, MICROECONOMIC INSIGHTS, February 18, 2018, available at <http://microeconomicinsights.org/divorce-laws-and-the-economic-behavior-of-married-couples/> (Last visited on June 22, 2019).

<sup>382</sup> See Libby Kane, *Here's What Happens to Your Stuff When You Get Divorced without a Prenup*, BUSINESS INSIDER, August 13, 2014, available at <https://www.businessinsider.in/Heress-What-Happens-To-Your-Stuff-When-You-Get-Divorced-Without-A-Prenup/articleshow/40133340.cms> (Last visited on June 23, 2019).

<sup>383</sup> Gabriel Cheong, *Prenup Format for Couples who want their Finances Kept Separate*, INFINITY LAW GROUP, MARCH 9, 2018, available at <https://www.infinlaw.com/faq/prenup-format-couples-want-finances-kept-separate/> (Last visited on June 22, 2019).

<sup>384</sup> See Denise Erlich, *5 ways separate property can become marital property*, ERLICH LAW OFFICE LLC, available at <https://erlichlegal.com/blog/5-ways-separate-property-can-become-marital-property/> (Last visited on June 23, 2019).

Further specifications in the prenuptial agreement must necessarily deal with the manner in which property acquired during marriage by means of gift or inheritance or damages from legal suits or settlements shall be considered.<sup>385</sup> Since it is possible for non-marital property to later be converted into marital property either consensually or by effect of law, clauses should also be incorporated regarding the manner in which the value of property will be distributed in case of appreciation in value at the time of division of assets.

For instance, consider a case where the husband and wife contribute towards the purchase of a famous painting worth INR 50 lakh, with the husband paying INR 10 lakh and the wife footing the rest of the bill. Further suppose in this case that the husband is an art aficionado and undertakes maintenance of the painting. After 10 years, the couple decides to divorce and at that time the value of the painting has appreciated to INR 90 lakhs. In such a case, in the absence of a prenuptial clause governing distribution of jointly purchased marital assets, ambiguity may arise as to who is entitled to the painting. In case the couple decides to sell the painting and distribute the proceeds amongst themselves, questions would necessarily arise as to whether the proceeds should be distributed based on their respective contributions to the price at the time of purchase, equally or in some other proportion. The husband may in fact, rightly bring a claim as to equal or additional percentage of the sale proceeds based on the argument that the appreciation in value is a result of his care and maintenance of the painting. The questions in this case could easily be answered if a prenuptial agreement, providing the manner of distribution of assets, had been entered into by the couple.

Couples should also consider negotiating prior to marriage regarding the use of funds for the payment of potential marital debts and whether they wish to comingle their personal incomes or dedicate only a portion of their incomes to the marital funds.<sup>386</sup> In case, funds of the spouses acquired prior to marriage are used for the purpose of opening a joint bank account, proper documentation should be maintained and reflections must be contained in the prenuptial agreement as to the contribution of each spouse and the manner in which they wish for the joint funds to be treated later on in the marriage.<sup>387</sup> Further, it may also be beneficial to demarcate within the prenuptial agreement as to how the common household expenses shall be discharged and the relative burden thereof on each spouse.

So also, in case either or both spouses have an existing business venture, if the spouse seeks to prevent the business or any asset associated thereof from being viewed as marital property, it would be beneficial to explicitly mention in the prenuptial agreement as to the exclusion of rights of the other spouse in relation to the assets of the business.<sup>388</sup> Based on the personal considerations among the spouses, similar exclusionary clauses may also be

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<sup>385</sup> See *What Does A Prenup Cover?*, OGBORNE LAW, available at <https://ogbornelaw.com/preup-cover/> (Last visited on June 22, 2019).

<sup>386</sup> See Erin Lowrey, *Why You Should Get a Prenup Even If You're Young and Broke*, MONEY, June 2, 2017, available at <https://money.com/prenups-what-to-include/> (Last visited on June 22, 2019).

<sup>387</sup> See Liz Weston, *You're Married, but Your Assets Don't Have to Be*, NERD WALLET, February 15, 2018, available at <https://www.nerdwallet.com/blog/finance/protect-assets-without-prenuptial-agreement/> (Last visited on June 22, 2019).

<sup>388</sup> *Pre-nuptial Agreement Clauses to Address Estate Planning*, available at <https://images.template.net/wp-content/uploads/2016/03/22101549/Pre-Nuptial-Agreement-Clauses-to-Estate-Planning.pdf> (Last visited on June 22, 2019).

incorporated with respect to other assets owned by one spouse, such as shares, jewellery, interest on debt issued, automobile and collectible items.<sup>389</sup>

Moreover, it is pertinent that a prospective Indian wife considers incorporating a clause in her prenuptial agreement which provides that the gifts that she receives in marriage shall be treated as her *stridhan*, meaning that she will have sole rights over it, with no rights vesting in either her husband or in-laws in relation to such gifts. Particular clauses could also be included stating as to the manner of devolution of property in case of death of either spouse and absence of any offsprings, which may indeed operate as a testamentary instrument, subject to existing law relating to wills.

It is also recommended that couples include a clause in their prenuptial agreement requiring each spouse to truthfully disclose their financial assets and liabilities at the time of marriage.<sup>390</sup> Such disclosure can allow each spouse to make an informed choice with respect to the marriage and make relevant financial decisions, keeping in mind the financial conditions of the other spouse.<sup>391</sup> A clause of this nature should preferably be associated with a penalty clause providing for imposition of a penalty in case of discovery of undisclosed assets or liabilities, which were held at the time of marriage.

## 2. Clauses related to children

Clauses concerning children and issues related to them can also be included in prenuptial agreements. In case of one spouse having children from previous marriage(s), the children's rights to his/her assets could potentially be secured by means of a prenuptial agreement.<sup>392</sup> By providing necessary stipulations in their prenuptial agreement, couples can ensure that in the event of their death in the course of marriage or during divorce proceedings, children from their previous marriage(s) are not deprived of their respective shares in his/her property,<sup>393</sup> and as mentioned earlier, such clauses can legally take effect as testamentary pronouncements for the purpose of succession on death of the spouse. Although such clauses and relevant variations thereof can potentially set down terms regarding inheritance for children, prenuptial agreements may not be able to set down rules regarding custody, visitation rights or child support that is required to be paid by one spouse to the other in case of separation.

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<sup>389</sup> See also Cindy Tran, *'If he doesn't sign it, the relationship will end': Divorce lawyer, 39, prepares a prenup that includes her shoes, towels, Tupperware and even Superman memorabilia*, THE DAILY MAIL, September 12, 2018, available at <https://www.dailymail.co.uk/femail/article-6157529/Divorce-lawyer-Fidan-Shevket-drafts-prenuptial-agreement-Tupperware-designer-shoes.html> (Last visited on June 22, 2019).

<sup>390</sup> Scot Cohn, *Here's how to bulletproof your prenuptial agreement*, CNBC, March 9, 2018, available at <https://www.cnbc.com/2018/03/09/the-american-greed-report-heres-how-to-bulletproof-your-prenuptial-agreement.html> (Last visited on June 22, 2019).

<sup>391</sup> *Prenuptial Agreements: Full & Fair Disclosure of Assets*, JD SUPRA, April 8, 2019, available at <https://www.jdsupra.com/legalnews/prenuptial-agreements-full-fair-40088/> (Last visited on June 22, 2019).

<sup>392</sup> Kelli B. Grant, *Jeff Bezos didn't have a prenup. But maybe you should*, CNBC, January 10, 2019, available at <https://www.cnbc.com/2019/01/10/bezos-divorce-highlights-usefulness-of-prenuptial-agreements.html> (Last visited on June 22, 2019).

<sup>393</sup> Jason Marks, *Prenups: Not Just for the Wealthy*, HUFFINGTON POST, April 25, 2013, available at [https://www.huffingtonpost.com/jason-marks/prenups-not-just-for-the-\\_b\\_3119074.html](https://www.huffingtonpost.com/jason-marks/prenups-not-just-for-the-_b_3119074.html) (Last visited on June 23, 2019).

This is because issues regarding custody and visitation are determined based on consideration of the principle of best interest of the child.<sup>394</sup> Since there is no formula which can be applied in all cases for an objective determination of what constitutes best interest, it is not feasible to contractually devise or in fact strictly enforce conditions regarding custody or visitation. Circumstances of parents and the temporal change therein may largely change the perception of courts regarding which parent should have primary custody or which parent may in fact pose a threat to the holistic growth of the child. Therefore, attempting to restrict judicial determination by means of prenuptial agreements would be rendered futile since such clauses could ultimately be rendered infructuous in a court of law.

Moreover, it must be noted that enforcement of such restrictive clauses may be potentially harmful to the interest of the child, owing to the fact that it would then potentially provide even an abusive parent with custody of a child just because the prenuptial agreement says so. So also, with reference to the determination of visitation rights, prenuptial agreements should not contain clauses which may pose a hurdle in the court's determination of whether a parent should be provided with such opportunity, which is anyhow a decision based on consideration of a number of relevant factors.

Additionally, it is suggested that the quantum of child support should not sought to be capped using a prenuptial agreement since a cap howsoever high or low cannot properly estimate the possible expenditures that may be incurred with respect to the children of the couple, since it is difficult to predict the number of children that will be born, when they will be born, the rate of inflation persisting at the time, the unique conditions surrounding the child and the cost of providing opportunities amenable to the structured growth of the child. Nonetheless, clauses of the prenuptial agreement may be used to specify the minimum threshold that must be adhered to in terms of upkeep of the children, by dealing with issues such as type of schooling to be provided,<sup>395</sup> nature of extracurricular activities that the children should be given the opportunity to participate in, and by providing for the fulfillment of basic necessities of the nature of safe living conditions, proper nutrition and season specific clothing options to be made available to the child.

### 3. Clauses related to spousal rights and duties

It is arguably a wise idea to specify the dynamics of the marital relationship sought by the spouses from each other. This can help ensure that the freedom of choice of either spouse is not inhibited by the other at any point during the marriage. Discussing the expectations that each spouse has from the other and mentioning the negotiated terms as to their respective rights and duties in a marriage can be beneficial in streamlining the roles within the marriage.<sup>396</sup>

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<sup>394</sup> Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413; Aveek Jayant, *Child custody law in India: a litigant perspective*, THE HINDU, February 2, 2013, available at <http://www.thehindu.com/opinion/op-ed/child-custody-law-in-india-a-litigant-perspective/article4371934.ece> (Last visited on June 23, 2019).

<sup>395</sup> *Social and lifestyle clauses in prenups*, CLEMENT LAW CENTER, available at <https://www.clementlawcenter.com/blog/2018/10/social-and-lifestyle-clauses-in-prenups.shtml> (Last visited on June 22, 2019).

<sup>396</sup> See Justine Borer, *Prenuptial Agreements: The Ultimate Symbol of Love?*, HUFFINGTON POST, August 22, 2013, available at [https://www.huffingtonpost.com/justine-borer/prenuptial-agreements-the\\_1\\_b\\_5698389.html](https://www.huffingtonpost.com/justine-borer/prenuptial-agreements-the_1_b_5698389.html) (Last visited on June 23, 2019).

On the basis of the needs of the spouses, they can specifically mention or exclude the rights that each of them have in relation to the marriage and the duties that each would have to perform in this respect. While the range of possible clauses in this respect would be fairly large, there are some clauses which would be specifically prudent for spouses to consider adding to their agreement.

A clause providing for the payment of compensation for proved marital torture or cruelty by either spouse can arguably act as an important safeguard against domestic violence.<sup>397</sup> In order for the clause to act as an effective deterrent, the amount so specified as the compensation, should be determined having regard to the income of each spouse such that the compensation amount appears to be considerably high to the spouse on whom it may be potentially applicable. The need for the accusation of cruelty to be legally proved prior to the compensation clause coming into effect should be emphasised so as to avoid extortion by a spouse. It is also advisable to mention only the minimum amount of compensation in the prenuptial agreement, in order to not restrict the powers of the adjudicating court to provide requisite compensation under the Protection of Women from Domestic Violence Act, 2005. Spouses could also use the prenuptial agreement as a tool for specifying the circumstances under which they would be permitted to remove themselves from the vicinity of their spouse or cease association with their spouse with 'reasonable excuse', without being vulnerable to being caused to return against their will by virtue of an order of restitution of conjugal rights.<sup>398</sup>

The prenuptial agreement may also comprise of provisions dealing with medical situations by mentioning the nature of duty on the part of the healthy spouse towards bearing the medical costs of the ailing spouse.<sup>399</sup> Such clauses should also necessarily deal with the nature of duties in case an earning spouse suffers from a medical condition in the course of marriage, rendering him or her incapable of continuing to draw the equivalent amount of income as before. Relevant clauses specifying the extent of insurance coverage that the couple would enjoy together should also be inserted.<sup>400</sup> The couple may further contractually decide to set aside some amount of money on a monthly or annual basis towards medical expenditure and determine the extent to which the corpus so formed can be utilised for payment of each of their medical bills, in case either suffers from a serious medical condition.<sup>401</sup> Such clauses can be specifically crucial for individuals who suffer from a chronic illness or disability (physical or mental) at the time of

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<sup>397</sup> Law Rato, Band, *Baaja & Prenup: Everything You Need to Know About a Prenup Agreement*, THE BETTER INDIA, February 15, 2018, available at <https://www.thebetterindia.com/131143/prenup-agreement-marriage-divorce/> (Last visited on June 22, 2019).

<sup>398</sup> Under Hindu Marriage Act, 1955, §9 (India), an order for restitution of conjugal rights may be passed by the court if one spouse has withdrawn from the society of the other without reasonable excuse.

<sup>399</sup> See Jennifer M. Riemer & Peter M. Walzer, *Prenuptial Agreements for Seniors*, available at [https://www.walzermelcher.com/wp-content/uploads/2017/04/3winter17\\_riemer.pdf](https://www.walzermelcher.com/wp-content/uploads/2017/04/3winter17_riemer.pdf) (Last visited on June 22, 2019).

<sup>400</sup> See *Prenuptial Agreements in Massachusetts*, available at [https://www.divorcenet.com/states/massachusetts/prenuptial\\_agreements\\_and\\_alimony\\_waivers](https://www.divorcenet.com/states/massachusetts/prenuptial_agreements_and_alimony_waivers) (Last visited on June 22, 2019).

<sup>401</sup> See *Regulating the Marriage* in DRAFTING PRENUPTIAL AGREEMENTS, IV-15 (Gary N. Skoloff et al, ed., 2019).

marriage, in charting out the manner in which their medical expenses would be dealt with post marriage.<sup>402</sup>

In case a spouse comes from a financially well off family and expects to receive assets as part of their inheritance in the future, it is suggested that they should incorporate clauses regarding the nature of rights in terms of possession, use or usufruct that their spouse may exercise either separately or in conjunction with them in relation to the inherited property.<sup>403</sup> Additional clauses could also be included referring to the nature of sharing of benefits received by one spouse in terms of government schemes, employment rewards or private assistance. If a husband or wife is engaged in a vocation or job providing for preferential hiring of a family member in case of their death, he or she may also specify in the prenuptial agreement about their intention for their job to be provided to their spouse in the event of his or death. The prenuptial agreement may also be used to comment on the need of the wife to change her surname following marriage.

Couples can also consider introducing a penalty clause in the prenuptial agreement in relation to breach of trust through disclosure of privileged communication between them through testimony or otherwise in a court of law, even though such evidence will not be admissible as per Indian Evidence Act, 1872. By specifically providing the dynamics of the fiduciary duties owed by one spouse to the other and providing for enforcement thereof through penalties, the prenuptial agreement may also be used by couples as a means of securing disclosures from each other pertaining to previous criminal records, previous or ongoing litigations, previous marital status and former allegations of marital misconduct raised against the spouse.

#### 4. Lifestyle clauses

The contractual nature of prenuptial agreements and the absence of any legally mandated form of such agreements can be seen to be providing scope for minute customisation of its clauses. Couples can utilise this flexibility of prenuptial agreements to incorporate ‘lifestyle clauses’ which deal with the manner in which they shall live as a couple and the ideals and standards that each spouse would be required to adhere to.<sup>404</sup> While such lifestyle clauses have been popularised through prenuptial agreements among celebrities,<sup>405</sup> they are easily adaptable

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<sup>402</sup> See Vicki Viramontes-LaFree, *Premarital Agreements, the Older Couple and Health-Care Expenses*, PASTERNAK & FIDIS, available at <https://www.pasternakfidis.com/premarital-agreements-the-older-couple-and-health-care-expenses/> (Last visited on June 22, 2019).

<sup>403</sup> See Michelle Kaminsky, *The Big Dilemma: Saying “I Do” with a Prenup*, LEGAL ZOOM, available at <https://www.legalzoom.com/articles/the-big-dilemma-saying-i-do-with-a-prenup> (Last visited on June 22, 2019).

<sup>404</sup> Van A. Larson PC, *Lifestyle Clauses Becoming More Popular in Prenuptial Agreements*, May 31, 2014, available at <http://www.vanlarsonlaw.com/kane-county-attorney/2014/05/31/lifestyle-clauses-becoming-popular-prenuptial-agreements/> (Last visited on June 23, 2019).

<sup>405</sup> *Some offbeat prenuptial agreements between celebrity couples*, LANGLOIS FAMILY LAW APC, December 28, 2017, available at <https://www.langloisfamilylaw.com/blog/2017/12/some-offbeat-prenuptial-agreements-between-celebrity-couples.shtml> (Last visited on June 23, 2019).

by non-celebrity couples as well, allowing them to pick and choose the way they are as a couple.<sup>406</sup>

Lifestyle clauses may potentially be used to govern most matters that the couple faces, right from the wedding to the divorce, and everything in between. Due to the versatile nature of clauses which could be introduced, a bride or groom could potentially require for the wedding ceremony to include a certain number of functions, choose the venue and even set out the theme for the marriage. Clauses in the prenuptial agreement could also be potentially used for the purpose of specifying whether the couple is to live together separately or jointly with either spouse's family, subject to the financial capabilities of the couple.

Since the lifestyle clauses of the prenuptial agreement, as with other types of clauses, will be effective only based on the free consent of both parties, the possibility of one spouse imposing their will on the other is considerably less. In case, a spouse is made to sign a prenuptial agreement with clauses to which he or she does not freely consent, standard mechanisms for voiding of the contract by proving coercion, fraud, undue influence or mistake can be used to prevent the clauses from taking effect altogether or to stop them from binding the disadvantaged spouse further.

Couples may further use lifestyle clauses for the purpose of determining the area that they will live in or the nature of housekeeping duties that each of them will perform.<sup>407</sup> In case the couple has a pet, they can use the prenuptial agreement to specify the custodial aspects with respect to the pet in case of their separation or divorce.<sup>408</sup> If the spouses belong to different religions, they may also provide for the religious belief system that their children would be raised in by prescribing a clause in the prenuptial agreement.<sup>409</sup> It is suggested that in such cases, the prenuptial agreement should also specifically provide that neither spouse would compel the other to adopt the practices of the religion he or she practices and neither spouse would be prevented by the other from practicing their religion, unless it causes a threat to the health of the family or has negative societal impact.

Inclusion of a fidelity clause could also be considered by couples, wherein the unfaithful spouse would be required to pay a certain amount as penalty to the other spouse or give up rights in shared marital assets if the adulterous relationship is established in a court of law.<sup>410</sup> Further, penalising clauses with respect to bad habits such as gambling, drug abuse or alcoholism could be included wherein the errant spouse would be liable to pay a penalty either in monetary terms, through waiver of rights or otherwise for violation of the specifications in such

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<sup>406</sup> See Elizabeth R. Feeney, *Lifestyle Clauses and Prenuptial Agreements*, MAVRIDES LAW, available at <https://mavrideslaw.com/lifestyle-clauses-prenuptial-agreements/> (Last visited on June 23, 2019).

<sup>407</sup> *Back to Basics: Common Prenuptial Agreement Provisions*, HELLO PRENUP, available at <https://www.helloprenup.com/prenuptial-agreements/common-prenup-provisions/> (Last visited on June 22, 2019).

<sup>408</sup> Angela McIlveen, *Pets—A New Reason To Consider A Prenuptial Agreement*, MCILVEEN FAMILY LAW FIRM, available at <https://www.mcilveenfamilylaw.com/prenuptialandpets/> (Last visited on June 22, 2019).

<sup>409</sup> Monica Mizzi, *Should You Add a “Lifestyle Clause” To Your Prenup? (Or Are They Just For Celebrities?)*, HUFFPOST, June 22, 2016, available at [https://www.huffpost.com/entry/should-you-add-a-lifestyle-clause-to-your-prenup\\_b\\_57908891e4b0a9208b5f1876](https://www.huffpost.com/entry/should-you-add-a-lifestyle-clause-to-your-prenup_b_57908891e4b0a9208b5f1876) (Last visited on June 22, 2019).

<sup>410</sup> Barry Finkel, *Infidelity Clauses: Protecting Marriage with Fear of Financial Fall-Out*, HUFFINGTON POST, March 26, 2013, available at [https://www.huffingtonpost.com/barry-finkel/infidelity-clauses-prottec\\_b\\_2903812.html](https://www.huffingtonpost.com/barry-finkel/infidelity-clauses-prottec_b_2903812.html) (Last visited on June 23, 2019).

respect in the prenuptial agreement.<sup>411</sup> Based on the widespread broadcasting of relationships which take place through social media, couples may also consider delineating through a social media clause, the nature of content regarding each other, each other's families, friends or their relationship that each of them can share on various social media platforms.<sup>412</sup>

### 5. Operational clauses

Based on their personal understanding, couples could also provide operative clauses and sunset clause within their prenuptial agreements. The operative clause could specify the particular event which would cause the prenuptial agreement to come into effect.<sup>413</sup> Multiple operative clauses dealing with the operation of specific clauses in the prenuptial agreement could also be incorporated based on the mutual accord of the couple. This can allow for flexibility in terms of giving the couple a choice to postpone the effect of the prenuptial agreement based on relevant considerations instead of being bound by it immediately after their marriage.

Operative events apart from marriage can include but would not be limited to judicial separation, moving out of a spouse from the marital home, filing of divorce or serving of notice of divorce. A sunset clause on the other hand, can also be incorporated in case the couple believes that the prenuptial agreement would not be required to govern their relationship in case of the happening of certain events or the passage of certain period of time.<sup>414</sup> A sunset clause can for instance, provide that the prenuptial agreement will not be operative after certain years of togetherness or after the birth of their second child. Additionally, it is suggested that couples entering into prenuptial agreements should also consider having an amendment clause, allowing for them to modify the clauses based on the changing circumstances of their relationship and their surroundings.<sup>415</sup>

## VI. CONCLUSION

While there is great potential for formulating prenuptial agreements capable of catering to the specific needs of Indian couples, the absence of specific legislative guidance on the same may pose a serious hurdle in the path of such agreements being used as cogent instruments for determining the nuanced dynamics of a marital relationship. Disregard of the potential benefits of introducing prenuptial agreements within the marital framework on account of simplistic concerns, often based on archaic thinking, and the absence of proactive deliberation by the State for recognising and regulating such agreements, is unfortunately acting as an impediment towards couples in India consensually setting out the terms on which they want to be married. As has been shown in the paper, some of the core criticisms which may be raised

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<sup>411</sup> Scott J. Adler, *Lifestyle Clauses in Prenuptial Agreements*, available at <http://unhappymarriage.info/lifestyle-clauses-prenuptial-agreements/> (Last visited on June 23, 2019).

<sup>412</sup> Deborah Hope Wayne, *Social Media & Marriage: Do We Need a Social Media Clause in our Prenup?*, FAMILY LAW MATTERS BLOG, July 25, 2017, available at <https://www.familylawmatters-blog.com/2017/07/social-media-marriage-need-social-media-clause-prenup.html> (Last visited on June 23, 2019).

<sup>413</sup> See *Zimmerman v. Zimmerman*, 579 N.W. 2d 591, 1998 ND 116 (1998).

<sup>414</sup> Steve Fritsch, *The Prenuptial Agreement Sunset Clause*, February 6, 2017, available at <https://www.oceansidedivorcelawfirm.com/prenup/sunset-clause/> (Last visited on June 23, 2019).

<sup>415</sup> See Jonathan W. Wolfe & Thomas J. DeCataldo Jr., *Unchartered Territory of Amending Prenuptial Agreements*, NEW JERSEY FAMILY LAWYER, available at <https://www.skoloffwolfe.com/files/2015-02-unchartered-territory-of-amending-prenuptial-agreement.pdf> (Last visited on June 23, 2019).

against prenuptial agreements can be rebutted easily. It has also been demonstrated that prenuptial agreements are not *per se* against established legal principles in India and can indeed be framed so as to not come into conflict with settled law. Further, the accordance of validity to prenuptial agreements in various countries around the world stands testimony to the possibility of realistically implementing the terms of such agreements.

It is true that marriage plays an important role within Indian society and there is a consequent fear that prenuptial agreements may taint the tightly held fabric of Indian families. However, we urge reconsideration of this position on the issue of prenuptial agreements, in light of the developments in the field of family law, both in India and abroad, some of which have been highlighted through the course of this paper. We submit that providing spouses with the autonomy to work on a consolidated outline, clearly denoting what they want from each other and the marriage, can not only help in ensuring that both have an equal footing in the relationship but also assist in protecting both spouses, particularly the female spouse in relevant cases, from being subjected to injustices which are generally prevalent within marital relations in India.

While the contractual nature of prenuptial agreements means that they can be considered through the lens of the provisions of the Indian Contract Act, 1872 to a certain extent, it is unfortunate that the existing coverage of Indian personal law concerning such agreements is largely insufficient. The question though remains as to whether in the absence of specific legal instruction regarding such agreements, it would be correct to consider marriage agreements like commercial agreements in the Indian context. Arguably such an orientation towards prenuptial agreements may not be ideal, given that prospective couples are likely to share loving relations wherein attitude for bargain is usually altruistic and magnanimous while entering into prenuptial agreements. Alternately, unlike commercial relationships future mapping in marital relationships is not easy; unexpected misfortunes, unexplored avenues, and emerging opportunities may force couples to revise their plans as after all they are “[e]nvisioning the end of a marriage not yet begun” and attempting to be planning to decide on a relation which has not yet materialised.<sup>416</sup> Hence, commercial and marital agreements would require entirely different treatments.

Consequently, we propose that there is a need for serious deliberation on the manner in which prenuptial agreements can be regulated and such regulations once formulated, should be incorporated within the Indian legal system instead of continuing to deal with such agreements in the currently judicial piecemeal manner. Further, in light of there being no definitive judicial pronouncement from the Supreme Court of India concerning the nature and extent of validity of prenuptial agreements, the creation of an instructive executive guidance note or the introduction of relevant legal provisions in personal laws governing the scope and extent of prenuptial agreements would be welcome. We express the hope that the Indian legislature and executive will soon recognise the emerging necessity of prenuptial agreements in relation to marriages in today’s India and not only extend legal recognition to the same, but also consider the formulation of one or more model prenuptial agreements which can thereafter act as samples of legally valid terms which couples in India can refer to in the course of formulating their own prenuptial agreements.

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<sup>416</sup> Margaret Ryznar and Anna Stepien-Sporek, *To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context*, 13 CHAP I. REV 27 (2009-10).