

## Prenuptial Agreement: Enforcing Marriage in the eyes of Law

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*Pre-nuptial agreement (pre-nup) an agreement of western origin is gaining its foothold in other parts of the world. In its classical western ideological sense the agreement is portrayed as a precautionary measure ensures to safeguard the assets of both the parties. The modern globalized world demands re-telling of the aspects behind the concept of such an agreement. It is in this aspect the author tries to analyze the development of the concept of a pre-nup and its effect on marriage in its modern sense. The paper also tries to analyze the issue of pre-nup being a sister concern of dower under its traditional notions of Muhammadan Law.*

### INTRODUCTION:

In the era of modern family, every moment relationships make and break in fractions of seconds.<sup>2</sup> Sometimes that's even drawn as a record, for example, take the instance of Britney Spears, who got divorced within fifty-five hours of her marriage and gained herself a Guinness Book of World Records<sup>3</sup>. It is also seen that citizenship of various nations is gained by way of marriage as it has become an easier option.<sup>4</sup> The meaning of marriage in this era is not that if a social institution but a relationship between two individuals through an agreement, just like a contract.<sup>5</sup>

Pre-nuptial agreement is such a contract as to validate the account of marriage.<sup>6</sup> Basically this agreement was a western concept, but now it is gaining momentum in the east as well. Pre-nuptial agreement, which is popularly known as pre-nup is an agreement before the marriage, entered by the parties intending to enter into the union of marriage.<sup>7</sup> This is done to ensure

<sup>1</sup> NUSRL, Ranchi

<sup>2</sup> <http://alfredadler.edu/sites/default/files/Robideau%20Master's%20Project%202008.pdf>, Accessed: May 10, 2015 at 2000 hours.

<sup>3</sup> Balnford 2002, pg. 29, [http://en.wikipedia.org/wiki/Britney\\_Spears](http://en.wikipedia.org/wiki/Britney_Spears), Accessed : May 10, 2015 at 2100 hours.

<sup>4</sup> <http://www.alllaw.com/articles/nolo/us-immigration/how-get-green-card-after-marriage-citizen.html> and <http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartG-Chapter2.html>, Accessed: May 10, 2015 at 2130 hours.

<sup>5</sup> <http://family.findlaw.com/marriage/pros-and-cons-premarital-agreements-prenuptials.html>, Accessed: may 10, 2015 at 2300 hours.

<sup>6</sup> Matthews v. Matthews, 162 S.E.2d 697, 698-99 (N.C. Ct. App. 1968) (refusing enforcement of an agreement entered during marriage due to lack of consideration).

<sup>7</sup> [http://en.wikipedia.org/wiki/Prenuptial\\_agreement](http://en.wikipedia.org/wiki/Prenuptial_agreement), Accessed: May 10, 2015 at 2100 hours.

that after marriage all the assets of both the parties are fairly divided. But the notion of pre-nup stands in-between many concepts of family law, contract law, economics, feminism and public interest.<sup>8</sup>

There are clauses for certain civil right to property as well as spousal support in case of break-up of marriage.<sup>9</sup> Hence, the concept of pre-nup can be stated to have re-emerged from feminist ideology, as it ascertains equal right to share of property and other requirements to marital life.<sup>10</sup> When we look into the recent Oscar Nominated Film-“*Gone Girl*”, we see the notion of modern women in marriage, where she is expected to walk out of it as soon as she realizes that her husband is having an affair. But she doesn't do so; rather she sticks around fighting to be with him, making him realize that even without any physical assault he had committed a crime, the crime of breaching her trust.<sup>11</sup> This is what marriage is now. With the growth of modern concepts of relationships, marriage as a strong social bond has weakened.<sup>12</sup> Therefore, through this paper the author tries to bring into light the notion of pre-nup through various discussions under different articles.

### **DOWER AS AN OLD TRADITION OF PRE-NUP:**

In Mohammedan law the idea of pre-up was availed even before the popular western notion. As most Muslim marriages involve the negotiation of a *mahr* provision as part of a marriage contract which consists of a monetary payment from husband to wife<sup>13</sup>, so the notion of *Mahr*, under mohammedan law, as defined by Tyabji, “*Mahr or dower is a sum that becomes payable by the husband to the wife on marriage, either by an agreement between the parties, or by operation of law.*”<sup>14</sup> Further, in the case of *Abdul Kadir v. Salima*<sup>15</sup>, Mahmood J., gave the best description of nature of dower.<sup>16</sup> It was observed by him:

<sup>8</sup> Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 Wm. & Mary L. Rev. 145 (1998), Av Lawler, Michael G. (2000) "Christian Marriage and Family in the Postmodern World," Sacred Heart University Review: Vol. 20: Iss. 1, Article 3. Available at: <http://digitalcommons.sacredheart.edu/shureview/vol20/iss1/3> available at: <http://scholarship.law.wm.edu/wmlr/vol40/iss1/4>, Accessed: May 11, 2015 at 2000 hours.

<sup>9</sup> Ibid.

<sup>10</sup> Gail Frommer Brod, (1994), “*Premarital Agreements and Gender Justice*,” 9 Yale Journal of Law & Feminism, Pg. 229.

<sup>11</sup> Is *Gone Girl* Feminist or Misogynist? (Oct 6, 2014), TIME, <http://time.com/3472314/gone-girl-movie-book-feminist-misogynist/>, Accessed: May 18, 2015 at 2200 hours.

<sup>12</sup> Ibid.

<sup>13</sup> Carroll, Lucy (1986), *Fatima in the House of Lords*, The Modern Law Review, 49(6): 776-781.

<sup>14</sup> V.P. Bhartiya; *Syed Khalid Rahid's MUSLIM LAW*, Fifth Edition, Eastern Book Company, 2009, pg-89.

“Dower under Muhammadan Law , is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of marriage and even where no dower is expressly fixed or mentioned at the marriage ceremony, the law confers the right of dower upon the wife as necessary effect of marriage. To use the language of *Hedaya*, the payment of dower is enjoined by the law merely as token of respect for its object (woman), wherefore the mention of it is not absolutely essential to the validity of marriage; and, for the same reason, a marriage is also valid, although a man were to engage in the contract on the special condition that there should be no dower.”<sup>17</sup>

In the case of *Zawahiri v. Alwattar*<sup>18</sup> the U. S .Court held that under the Muslim Marriage Contract prenuptial agreements were not enforceable. But further the Court also held that a Muslim Marriage Contract could be enforceable as a simple contract also. In this case the wife seeks for enforcement of the Muslim Marriage Act on the basis of the theory that the Muslim Marriage Contract was basically an Islamic prenuptial agreement. But this contention was rejected by the Court as it could not be established that there was no requisite which could fulfill the condition of prenuptial agreement, as provided under the Ohio law, i.e the requirement of advice of counsel for full and complete disclosures.<sup>19</sup> Also, in case of *Ahmed v. Ahmed*<sup>20</sup> the issue arose as to whether the *mahr* agreement should be construed as a premarital contract where the parties had been married in a civil ceremony six months prior to signing the *mahr* agreement at the Islamic marriage ceremony.<sup>21</sup>

But in the case of *Akileh v. Elchahal*<sup>22</sup>, considering the validity of *mahr* as a prenuptial agreement, the Appellate Court provided that-“a marriage is sufficient consideration to uphold an ante nuptial agreement” and therefore, the contract between the parties was valid and enforceable.<sup>23</sup>

We see that consideration of *dower* or *mahr* as prenuptial agreement the view of Courts vary, but the establishment of such agreement as part of marriage has been upheld in certain

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<sup>15</sup> ILR (1886) 8 All 149

<sup>16</sup> Ibid.

<sup>17</sup> *Hamilton's Hedaya* by Grady , Pg. 44.

<sup>18</sup> *Zawahiri v. Alwattar*, 2008-Ohio-3473

<sup>19</sup> <http://shariainamerica.com/2011/11/23/zawahiri-v-alwattar-is-a-muslim-marriage-contract-a-prenup-or-a-simple-contract/>, Accessed: May 12, 2015 at 2115 hours.

<sup>20</sup> 261 S.W.3d 190 (2008); 2008 Tex. App. LEXIS 466

<sup>21</sup> <http://shariainamerica.com/ahmedvahmed/>, Accessed: May 13, 2015 at 1200 hours.

<sup>22</sup> 666 So. 2d 246; (Fla. Dist. Ct. App. 1996)

<sup>23</sup> <http://shariainamerica.com/akilehvelchahal/>, Accessed: May 12, 2015 at 2120 hours.

decisions.<sup>24</sup> As it is known that marriage in Muhamadan law is of contractual nature, since both parties have to agree to the marriage i.e. on utterance of word “kabool”, they show their consensus. It can be clearly provided that marriage is falling under the ambit of contract law, as *nikhah* is the act of marriage and *mahr* is its prenuptial agreement.<sup>25</sup> In this regard we see that under the old traditions the idea of *mahr* was prenuptial agreement developed.

### MARRIAGE IN POST-MODERN SOCIETY:

What is marriage? As per sociologists, marriage is a social institution wherein it forms an effective part of the social structure.<sup>26</sup> A marriage leads to inter-relationship between, two families and so ensures strong bonds within the society. “Marriage is also an interpersonal relationship, the ultimate avowal of committed, unconditional, and mutual love.”<sup>27</sup>

It is commonly interpreted in social history, that there lies two main factors for the massive transformation the institution of marriage has undergone in Western societies during the modern era.<sup>28</sup> This is due to the processes of individualization and pluralization on the one hand, other arrangements have come in the place of an institution that traditionally used to regulate sexual behaviour, legitimize children, and organize the division of labour between men and women and the transmission of property and resources to dependents.<sup>29</sup>

“Assuming that this development reached its apex at the close of the 20th century, one may wonder whether there is any significant role for marriage in postmodern times. Analysts still differ about whether modernity’s dominant message about marriage has been one of inevitable decline and eventually total collapse, or whether marriage has after all adapted fairly well to the modernizing trends of the past three centuries. But even if it is true that modern marriage has compensated for its loss of relevance by what it has gained in terms of

<sup>24</sup> Ibid.

<sup>25</sup> R. Lantz, Herman, Romantic Love in the Pre-Modern Period: A Sociological Commentary, *Journal of Social History*, Vol. 15, No. 3, Special Issue on the History of Love (Spring, 1982), pp. 349-370, Available at: [http://www.jstor.org/stable/3787152?seq=9#page\\_scan\\_tab\\_contents](http://www.jstor.org/stable/3787152?seq=9#page_scan_tab_contents), Accessed: 13 May, 2015 at 2100 hours.

<sup>26</sup> Ibid.

<sup>27</sup> Lawler, Michael G. (2000) “*Christian Marriage and Family in the Postmodern World*,” Sacred Heart University Review: Vol. 20: Iss. 1, Article 3. Available at: <http://digitalcommons.sacredheart.edu/shureview/vol20/iss1/3>

<sup>28</sup> “*What Future for Marriage in Postmodern Times? Perspectives from Social History, Ethics, and Theology*”, the Study of Marriage & Spirituality at the Theology Faculty of the Catholic University of Leuven, 8 March 2007, Available at: <http://www.intams.com/events-col08.htm>, Accessed: May 12, 2015, 2140 hours.

<sup>29</sup> Ibid.

fairness, gender equality, and partnership satisfaction, the troubling objection is that alternative forms of life score equally high on these scales.”<sup>30</sup>

A sacramental marriage is considered to be antithesis of American individualism.<sup>31</sup> A sacramental marriage isn't just a wedding meant to be celebrated, rather, the requirement of an equal and loving partnership to be lived for the whole of life. “When believing spouses covenant to one another in marriage, they commit themselves to explore together the religious depth of their married life and to respond to that depth in the light of their mutual covenant to Christ and to the church in which he abides.”<sup>32</sup> Marriage does not isolate the spouses from life; instead it immerses them in life, and confronts them with the ultimate questions of life and death that are the stuff of religion.<sup>33</sup>

So, marriage has become more optional and more fragile since intimacy and romance became the prime considerations and love developed into its one and only prerequisite. Not only do spouses separate more easily, once the ideal of the perfect love match evaporates from their unions, but now we also see that people increasingly opt for alternative forms of loving relationships instead of entering into the institution of marriage. In the post-modern era with the impact of individualization and pluralization, it has led to change in marriage from a romantic relationship, to a contractual agreement like pre-nup.

## **DEVELOPMENT OF PRE-NUPS IN POST- MODERN ERA:**

It is viewed that pre-nups has now become a common phenomena in west, especially in the United States, Canada and some nations of Europe. In the U.S, the concept of pre-nup is interwoven with the concept of family law, contract law, economics and feminism. As in U.S. there is Uniform Premarital Agreement Act (UPAA) which was approved in the National

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<sup>30</sup> Ibid.

<sup>31</sup> Lawler, Michael G. (2000) "*Christian Marriage and Family in the Postmodern World*," Sacred Heart University Review: Vol. 20: Iss. 1, Article 3. Available at:<http://digitalcommons.sacredheart.edu/shureview/vol20/iss1/3>, Accessed: May 15, 2015 at 1746 hours.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

Conference of Commissioners of Uniform State Laws, and is now adopted by half of its states.<sup>34</sup> Under the UPAA, “an agreement will not be enforceable if:-

(1) it is shown that there was lack of voluntariness on the part of one of the parties<sup>35</sup> ( this is already a defense provided under contract law); or

(2) on the ground that –(a) the agreement was substantially unreasonable and, (b) the aggrieved party did not have adequate knowledge of the other party’s financial position.”<sup>36</sup>

Further the UPAA allows enforcement without financial disclosure wherein there has been waiver of the right to enforcement or when the party against whom enforcement is sought obtained or reasonably could have obtained the information from another source. “As Section 6(a)(2) of the UPAA holds that an agreement will not be enforceable if the agreement was unconscionable when it was executed and, before execution of the agreement, [the party against whom enforcement is sought]: (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.”<sup>37</sup>

As viewed the general approach of this UPAA act is that parties should be free, within broad limits, to choose the financial terms of their marriage, with the limits of due process in formation, on the one hand, and certain minimal standards of substantive fairness, on the other.<sup>38</sup> As per prenuptial agreement as defined under Section 1(1): “an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage had the disadvantage of encompassing agreements that were entered by couples about to marry but that were not intended to affect the parties” existing legal rights and obligations upon divorce or death, e.g., Islamic marriage contracts, with their deferred *Mahr* payment provisions.<sup>39</sup>

<sup>34</sup> Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127, 129-30 (1993).

<sup>35</sup> UNIFORM PREMARITAL AGREEMENT ACT, § 6(a)(1), 9B U.L.A. at 376.

<sup>36</sup> UNIFORM PREMARITAL AGREEMENT ACT, § 6(a)(2), 9B U.L.A. at 376.

<sup>37</sup> [http://www.uniformlaws.org/shared/docs/premarital%20and%20marital%20agreements/2012\\_pmaa\\_final.pdf](http://www.uniformlaws.org/shared/docs/premarital%20and%20marital%20agreements/2012_pmaa_final.pdf), Accessed: May 18, 2015 at 2230 hours.

<sup>38</sup> [http://www.uniformlaws.org/shared/docs/premarital%20and%20marital%20agreements/2012\\_pmaa\\_final.pdf](http://www.uniformlaws.org/shared/docs/premarital%20and%20marital%20agreements/2012_pmaa_final.pdf), Accessed : May 12, 2015 at 2245 hours.

<sup>39</sup> Nathan B. Oman, “*Bargaining in the Shadow of God’s Law: Islamic Mahr Contracts and the Perils of Legal Specialization*,” 45 Wake Forest Law Review 579 (2010), Available at:

In England, in the case of German heiress *Katrin Radmacher's*, wherein the Supreme Court found, for the first time that prenuptial agreement with her former husband to be of binding nature. The judges were of the view that in the right case a prenuptial agreement could have decisive or compelling weight.<sup>40</sup>

Recent development towards pre-nup was provided by its Law Commission, wherein the commission in its report on the reform of matrimonial property laws, called for the introduction of standard formulas in order to resolve disputes over financial settlements and publication of official guidance on what constitutes legitimate "financial needs".<sup>41</sup> Professor Elizabeth Cooke, Law Commissioner for property, family and trust law, said: "Pre and post-nuptial agreements are becoming more commonplace but the courts will not always follow them and lawyers are therefore not able to give clear advice about their effect. Qualifying nuptial agreements would give couples autonomy and control, and make the financial outcome of separation more predictable." Suzanne Kingston, a family specialist with the law firm Withers, said: "These recommendations represent a welcome stride towards greater autonomy and certainty for couples. If implemented, then a pre-nup fulfilling certain conditions will be legally binding. However, it will not be possible to avoid meeting the financial needs of partners and children and, as always, the question is what falls under the definition of 'needs'?"<sup>42</sup> So, the prenuptial agreement must solve the essentials of this question in order to provide for a valid base to the current understanding of it.

Thereon, a prenuptial agreement, as it is understood in the West, defines how assets will be divided in the event of a divorce, and helps limit the claims spouses can make on each other. "Pre-nuptial agreements have no legal sanctity in India. This is because of the differences in the definition of marriage itself- marriages in the US are regarded as contracts entered into by equal parties, whereas the law in India views them primarily as a sacrament."<sup>43</sup> Even then if such pre-nup agreement was to be considered in India, it would

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[http://www.uniformlaws.org/shared/docs/premarital%20and%20marital%20agreements/2012\\_pmaa\\_final.pdf](http://www.uniformlaws.org/shared/docs/premarital%20and%20marital%20agreements/2012_pmaa_final.pdf), Accessed: May 12, 2015 at 2345 hours.

<sup>40</sup> <http://www.theguardian.com/money/2010/oct/20/prenuptial-agreement-enforced-uk-law>, Accessed : May 12, 2015 at 2300 hours.

<sup>41</sup> <http://www.theguardian.com/money/2014/feb/27/pre-nuptial-agreements-legally-binding-divorce-law-commission>, Accessed: May 12, 2015 at 2315 hours.

<sup>42</sup> Ibid.

<sup>43</sup> [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), Accessed: May 14 , 2015 at 1915 hours.

fall under the ambit of Indian Contract Act, 1872. As under Section 10 of the Act, 1872, states that agreements are to be considered contracts if they are made by the free consent of the parties.<sup>44</sup>

It is observed that pre-nuptial agreements do not offend against the constitutional protection accorded to the institution of marriage and the right to marry.<sup>45</sup> But similar to contract, prenups are agreements between the parties, and there lies enforcement of duty to fulfill such obligations and in case of breach of such duty, it leads to liability.<sup>46</sup> Even when Contract law has some loopholes, like in pre-nups there are aspects of agreements that parties may not agree to bypass or waive. For example, parties may not agree to impose large penalties-amounts far beyond those needed for compensation-in the case of non-performance, and they may not waive the duty to act in good faith.<sup>47</sup> In this regard we find that pre-nup is one such tool to generate the sense of obligation in the minds of the parties entering into the union of marriage and build in the co-ordeal contractual relationship between the two.

## CONCLUSION:

“Marriage is a beautiful union between two souls, meant for each other”, is now only a fictional belief of the people. Marriage is no more within the lines of an act for procreation of children or form of strong social bond. Rather now it is a union between two people as an agreement in form of contractual obligations, fulfilling the desires mentioned under such. In this aspect while looking into the scenario of *mahr* or *dower* in Mohammadan law to development of UPAA and pre-nups in other developed nations, we see that such agreement has been created to ensure the protection of position of both the parties, but is indirectly enforcing the duty of marital relationship over them. In this aspect it can be concluded that as pre-nup is entered before marriage, the obligations under it are similar to that of a marital life, which leads to enforcement of marriage through indirect means, which is actually done in good faith as in this post modern period relationship rarely last for more than a month, and so does marriage.

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<sup>44</sup> Section 10, *Indian Contract Act*, Act No. 9 of 1872

<sup>45</sup> *Report of the Study Group on Pre-nuptial Agreements*, Tánaiste and Minister for Justice, Equality and Law Reform, Mr. Michael McDowell, T.D., Available at: <http://www.inis.gov.ie/en/JELR/PrenupRpt.pdf/Files/PrenupRpt.pdf>, Accessed : May 15, 2015 at 2345 hours.

<sup>46</sup> *Ibid.*

<sup>47</sup> Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. pg. 697, 712-38.



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