

Contemporary Challenges to the Concept of Nikah and Divorce in Pakistan: Critical Discourse of Judicial Activism and Religious Scholars Viewpoint

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Abstract: *Family is the cornerstone of a peaceful society, and Nikah is the rightful way of constituting a family. Marriage and divorce in Pakistan are currently facing issues that have led to significant discussions, especially over judicial activity and the viewpoints of religious academics. This study examines the complex difficulties by analyzing the interaction between legal systems and religious interpretations. Judicial activism in Pakistan has significantly influenced the definition of Marriage and divorce. Courts are more frequently involved in resolving matters concerning women's rights, gender equality, and safeguarding individual freedoms under Islamic law. This involvement has sparked discussions among legal experts and religious leaders, influencing the changing field of family law. Religious experts are dealing with the conflicts between traditional interpretations of Islamic law and the changing social dynamics in present-day Pakistan. The study analyses different perspectives within religious communities about topics including women's rights in Marriage, reasons for divorce, and the influence of religious beliefs on family law. This critical discourse explores the complexity of Nikah and divorce in Pakistan, focusing on the interplay between legislative reforms, judicial activity, and religious factors.*

Keywords: *Nikah, Marriage, Divorce, judicial activism, religious viewpoints, Pakistan, Quran*

The notion of Marriage and its Propositions in Islam

Marriage is a social institution that has existed since the beginning of humanity. Marriage is a formal relationship between a man and a woman acknowledged by tradition or legal regulations. It includes specific privileges and responsibilities for the couple and their children. Marriage serves two primary purposes: managing gender relationships in society and determining a child's connection to the

community ([Azzouz, 2022](#)).

Marriage rituals have varied throughout different cultures. However, these two functions are prevalent even inside the institution of Marriage. It refers to the societal acceptance of Physical relationships and the responsibilities of parents in raising children ([Shahid, 2013](#)).

Islam acknowledges and embraces the institution of Marriage as the foundation of human civilization once it has been cleansed of any corrupt elements that may have infiltrated it. Islam views Marriage as a social contract with diverse responsibilities and duties rather than solely for sexual pleasure. According to the Divine Faith, a woman is considered a spiritual and moral being handed to a man with a sacred commitment seen by Allah, not a mere object of amusement. The wife's role is not solely to bring sensual pleasure to the male but to collaborate with him to create a meaningful existence for the family and, ultimately, humanity ([Seager, 2020](#)).

The Holy Qur'an has highlighted many purposes of Marriage in numerous verses. Surah Ar-Rum, Verse 21, mentions that one of God's signs is the creation of spouses from men so they can find peace and love in one another. This verse states that females are not inferior to males because females are produced from better material, while males come from a base origin. Both men and women are descendants of Adam and, hence, share the same soul. Marriage, as stated in the Holy Qur'an, is to unite two essentially one soul. Their independent lives represent an atypical stage, transforming into their natural state with Marriage and bringing them physically, mentally, and emotionally closer to one another ([Parashar, 2021](#)).

Both men and women share an equal inheritance of the blessing of life. Without a deep and personal connection, they cannot fully experience the true essence of existence ([Hidayat & Azahari, 2020](#)). Surah Al-A'raf, verse 189, explains that God created humans from a single soul and provided a spouse to take comfort in. The term "comfort" encompasses more than just sexual satisfaction. Marriage in Islam is imbued with spiritual and moral principles, enhancing the importance of marital relationships in personal and societal contexts ([Nayak, 2021](#)).

In Islam, the relationship between men and women has been cleansed, and the happiness of Marriage has been protected by completely forbidding any form of extramarital relationships ([Bone, 2020](#)). The Holy Qur'an emphasizes the importance of Marriage for individuals to live a righteous life without immorality and emotional restrictions. In Surah Al-Baqarah, verse 187 of the Holy Qur'an, it states: "They (your wives) are as a garment to you, and you are as a garment to them." The marital relationship between husband and wife is eloquently expressed with unparalleled elegance. This is an accurate depiction of the relationship between the two. The husband and wife provide mutual support, comfort, and safety, complementing each other like garments fitting together ([Indrayanto, 2023](#)).

The Holy Qur'an emphasizes that sexual pleasure in Marriage should not solely serve physical desires but rather be aimed towards higher purposes. Surah Al-Baqarah, Verse 223 states that women are like

fields to men, so they can approach them as they like, but they should take care of their well-being and be mindful of meeting Allah. Here, wives are compared to cultivable ground cultivated for sowing and reaping progeny, not just for physical pleasure. The verse's conclusion emphasizes the importance of not losing sight of moral and spiritual responsibilities even during intense physical pleasure, as these are times when one's awareness of the fear of the Lord and accountability in the Hereafter may be diminished ([Yasar, 2022](#)).

The notion of Divorce and its Propositions in Islam

The Arabic term for divorce is Talaq, which translates to "unlocking or dissolving the knot," according to Imam Raghīb. In the language used by legal experts, Talaq refers to the termination of a marriage or the invalidation of its legal status through the utterance of specific phrases ([Embong, Khairuddin & Kadir](#)).

Divorce can be categorized into Ahsan, Hasan, and Bid'a. Talaq Ahsan is the divorce method when the husband ends the Marriage by saying "talaq" once while the wife is not menstruating, and they have not had copulation during that time. The wife then observes her waiting period, known as 'Idda. Talaq Hasan, or praiseworthy divorce, occurs when a husband divorces his beloved wife by uttering three sentences of divorce during three consecutive periods of purity ([Farooq](#)). Talaq Bid'a refers to a husband divorcing his wife by uttering three divorces simultaneously. Most jurists believe that Talaq is valid. However, it goes against the principles of Shari'ah. Therefore, a man who chooses this method of divorce is considered to be breaking Islamic Law. Khula' is the term used to describe a woman's right to request the dissolution of Marriage. It is a facility offered to a wife to obtain a divorce from her husband by repaying a portion or the entire sum of the bridal present ([Yazdani, 2021](#)).

In Islam, Marriage is considered a civil contract. However, the associated rights and responsibilities are deemed crucial for the well-being of humanity, therefore giving it a high level of sacredness. Islam acknowledges the permanence of divorce in situations where marital relations are so toxic that a harmonious family life becomes unattainable despite the sanctity of the marriage bond. Islam does not support unrestricted divorce based on trivial reasons, as it could jeopardize the stability of family relationships ([Yuhasnibar & Wati, 2023](#)).

Islam permits divorce for valid reasons but has implemented safeguards to restrict its misuse ([Ali, 2021](#)). French legal scholars Planiol and Rupert have highlighted Islam's perspective on divorce by stating, "Divorce is mischief." However, it is unavoidable for the community's well-being, as it is the sole solution to prevent a potentially more severe injury ([Freeman, 1962](#)). Prohibiting divorce is akin to prohibiting surgery, as both involve causing harm for the greater good. Legislating for divorce, following Islamic practices, does not pose any danger. It is not divorce itself that ruins married life and breaks its sacred bond, but rather the misunderstandings that arise between the couple, hindering the strengthening of their Marriage and leading to its dissolution ([Suryani, 2022](#)). Divorce prevents the escalation of

animosity between a husband and wife, which could potentially harm society, as stated by Hasan Ibrahim ([Hasan, 1967](#)).

Contemporary Challenges to Marriage and Divorce in Pakistan

The increasing divorce rate in Pakistani society is said to be influenced by the Western attitude towards Pakistani women. Developed countries are providing scholarships and employment opportunities in multinational corporations to women. Western ideals and trends are causing strain in the relationships between married couples, leading to an increase in divorces ([Ansori & Juliansyahzen, 2022](#)).

Common causes of divorce in Pakistani society include short temper, impatience, lack of trust, joint family structure, forced marriages, social status inequalities, extramarital affairs, and husband's second Marriage. In modern society, the concept of separation deviates significantly from the teachings of Islam. The Quran states that Allah detests division. In Islam, divorce is not an act of revenge or hatred, as it has unfortunately become in our society ([Ali, 2012](#)).

The long-term effects of separation on a woman can be devastating. Separation is frequently attributed to women, and in Western society, women are commonly held primarily responsible for the failure of a marriage. The societal stigma associated with being divorced affects a woman in all aspects of her life. This makes it challenging to achieve a life characterized by dignity and esteem ([Mir-Hosseini, 2018](#)).

Critical Discourse of Judicial Activism and Religious Scholar's Viewpoints Regarding Nikah and Divorce:

Debates in Pakistan have extensively discussed judicial activism and its effects on the legal and political environment, with varying perspectives. Some believe that judicial activism has prompted essential changes and safeguarded rights, while others worry that it weakens the division of powers and democratic values. Advocates assert that judicial activism is necessary to protect human rights and uphold the rule of law, particularly in a nation with potentially feeble or corrupt political institutions ([Lindbekk, 2017](#)). Critics argue that it weakens the separation of powers and intrudes on the jurisdiction of the executive and legislative branches. An example that showcases judicial activism is a relief provided by a judicial marriage case in November 2023 to Pakistan Tehreek-e-Insaf Chairman Imran Khan and his wife Bushra Bibi by dropping the case about their alleged 'un-Islamic wedding.' ([The Express Tribune, 2023](#)). The court's dedication to social justice was evident, but it also sparked questions about the limits of its authority. Nevertheless, this ruling is an instance of judicial overreach, as it involved personal issues that could not directly affect safeguarding human rights or adherence to the rule of law. Furthermore, some contend that such activity may establish a risky precedent for courts to interfere in private matters beyond their intended boundaries.

Religious scholars' perspectives on Marriage and divorce in Pakistan:

In Pakistan, the viewpoints of religious experts are essential in influencing family law, especially in matters related to Nikah (Marriage) and divorce. In a recent instance, a court in Pakistan requested the

input of religious scholars on the recognition of a woman's right to divorce under Islamic law. The scholars' opinions on this issue influenced the court's decision to approve the woman's divorce, underscoring the substantial influence of religious ideas on family law in the nation. Islamic scholars frequently highlight the sanctity of Nikah as a sacred agreement and emphasize the significance of following Islamic rules in family affairs. The focus on Islamic values in family affairs has resulted in an intricate relationship between religious beliefs and legal entitlements in Pakistan ([Ahmad & Ahmed, 2021](#)).

Islamic scholars are essential in interpreting sacred scriptures and influencing legal decisions, although there are continuing discussions regarding how much religious ideas should influence family law. In Pakistan, the practice of "Talaq," which means divorce in Islam, is strictly governed and must follow precise procedures as defined in Islamic law. This has presented issues for persons seeking divorce as they may encounter obstacles in understanding and complying with the country's religious and legal obligations. There is a debate over whether strict devotion to Islamic principles may restrict women's rights in Marriage and divorce or if it is necessary to maintain the integrity of Nikah based on religious beliefs. The interaction between religion and legal reforms influences Pakistan's family dynamics and legal results. The contentious subject of triple Talaq, or instant divorce, has sparked intellectual debate ([Aman et al., 2019](#)).

Some support revisions to promote gender fairness, while others defend existing customs. An important event in this situation is the 2017 Triple Talaq ruling by the Indian Supreme Court, which deemed the practice; this ruling has triggered discussions among religious experts over the necessity for comparable reforms and the equilibrium between religious doctrines and contemporary laws in Pakistan's legal norms. Some argue against reforming Islamic principles in family problems to promote gender justice, advocating for the preservation of traditional customs that have been maintained for generations. The Indian Supreme Court's ruling on triple Talaq may not be universally applicable or embraced in other Muslim-majority nations, such as Pakistan, because of distinct legal and cultural environments ([Abbasi & Nadeem, 2024](#)).

In Iran, where Sharia law strongly impacts the legal system, there has been opposition to enacting reforms concerning women's rights. The Iranian government justifies its commitment to traditional Islamic standards by referencing cultural and theological beliefs that emphasize men's dominance in family affairs. Some countries may oppose implementing reforms on women's rights owing to cultural and religious norms, but progress can still be achieved. Supporters of gender equality can operate within these environments to question conventional standards and advocate for legal changes that safeguard women's rights ([Zakar, Zakar, & Kramer, 2011](#)).

Convergence of Judicial Activism and Religious Scholars' Perspectives on Family Law:

Judicial activism and religious experts' perspectives overlap in family law matters, especially those

concerning Nikah and divorce. In certain nations, judges can enforce religious laws to advance gender equality, even if they contradict conventional beliefs upheld by religious academics. For instance, a judge can offer women more rights in divorce based on ideals of fairness and equality derived from spiritual teachings. Religious experts may contend that these interpretations do not align with the original purpose of the religious rules. The conflict between judicial activity and spiritual beliefs can result in intricate legal discussions and obstacles in family law proceedings. Courts frequently balance between protecting fundamental honor and honoring religious traditions. Religious traditions should be considered in family law disputes, but it is essential to prioritize safeguarding fundamental rights like gender equality and freedom from discrimination. It can be difficult to balance these conflicting interests, but the courts must prefer maintaining constitutional values over religious views ([Shah & Farooq, 2020](#)).

Challenges and Controversies: Critical Discourse of Judicial Activism and Religious Viewpoints

Examining judicial activity and religious academics' perspectives in Pakistan encounters obstacles and disputes. A subject of debate involves interpreting Islamic law within modern legal systems. Some argue for a progressive reading to match modern principles, while others support strict adherence to old views. Pakistan must navigate the challenges by maintaining justice, equality, and religious freedom, honoring the various cultural and religious customs that influence its community. Pakistan may progress towards a fair and inclusive legal system that benefits all its residents by engaging in open discourse, thoughtful debate, and a dedication to preserving the rule of law ([Giunchi, 2013](#)).

Judicial activism and the perspectives of religious academics substantially impact the social dynamics of Pakistani society. Legal rulings and religious beliefs influence society's expectations for Marriage, divorce, and family dynamics. Interactions between the judicial and religious authorities can either uphold traditional norms or question them, causing social conflicts and discussions. It is essential to carefully handle the intricate balance between legal principles and religious beliefs in Pakistan to foster harmony and togetherness among its diverse population. Pakistan promotes a more united and diverse society by encouraging mutual understanding and respect among many stakeholders, ensuring the protection of everyone's rights and views ([Minallah, 2007](#)).

Pakistan is an Islamic Republic according to the 1973 constitution, where any law conflicting with the Qur'an and Sunnah is considered invalid. Pakistan's family law is mostly derived from Islamic law. However, it lacks specificity. The courts have significant discretion due to the absence of specific legislation, leading to inconsistent rulings ([Haider, 2000](#)). According to scholars such as Martin Lau, Islamization in Pakistan has been primarily driven by the judiciary. Pakistani courts have occasionally departed from Islamic law, performed *ijtihad*, and extended or amended Islamic law in interpreting the law and exercising discretion. *Khul's* incidents can be mentioned as examples where *khula* is granted without the husband's agreement, despite conflicting with mainstream Islamic principles ([Sabreen, 2020](#)).

There have been instances where children were considered legitimate even though they did not meet the standards for legitimacy in Islamic law. The case of Hamida Begum v. Murad Begum is reported in PLD 1975 SC 624. Additional instances include granting custody to the mother even after her remarriage (Muhammad Bashir v. Ghulam Fatima, PLD 1953 Lahore 73) and expanding the disqualification rule for mothers upon remarriage to fathers (Feroze Begum v. Muhammad Hussain, 1983 SCMR 606). Court rulings in Pakistan have favored women's rights and human rights. The Pakistani judiciary considers social needs and ideals when deciding family law matters ([Sabreen, 2020](#)).

Changes in societal dynamics are mirrored in the development of court precedents in Pakistan concerning family law. The legal case Zia-ur-Rehman vs. Gul Bibi (2021)¹, which dealt with polygamy, demonstrates the judiciary's changing position on customary behaviors. The court acknowledged that polygamy is allowed in Islam but established more stringent restrictions and procedural protections to reconcile religious freedom with the safeguarding of women's rights. This evolution demonstrates how judicial activism has influenced legal norms to follow constitutional principles while honoring religious traditions. Discussions on judicial activism and religious academics' perspectives on family law have led to legislative actions ([Yefet, 2009](#)).

The discussion on judicial activism and religious academics' perspectives on family law in Pakistan emphasizes the necessity for a sophisticated and equitable approach. Collaboration among judges, religious scholars, and lawmakers is crucial for dealing with the intricacies of family law while maintaining constitutional values and honoring cultural and religious diversity ([Zia, 2022](#)).

Conclusion

Resolving disagreements between families in Pakistan necessitates a comprehensive strategy beyond just legal structures. Meaningful reform can be achieved by considering the social, cultural, and economic aspects contributing to these difficulties. It is crucial to address both the hands-on execution of reforms and broader cultural changes to tackle the fundamental causes of family law challenges. Lasting change in Pakistani society can only be achieved through an integrated strategy, legal structures, and underlying social causes.

Collaboration among government institutions, non-governmental organizations, religious scholars, and community people is essential for a comprehensive approach considering all viewpoints. Education and awareness initiatives are vital in changing cultural perceptions about family conflicts and advancing gender equality. In addition, preventing conflicts from worsening can be achieved by developing alternate dispute resolution procedures and offering support services to families going through a crisis. Pakistan's more fair and equitable family law system can only be achieved if all relevant parties collaborate.

Collaborating with different stakeholders is crucial, but ensuring that all perspectives are accurately represented and that the balance of power is not biased toward specific groups can be difficult. Moreover,

¹ Writ Petition No. 1050-M/2021

depending exclusively on education and awareness efforts may not effectively tackle the systemic difficulties inherent in the family law system in Pakistan. Policymakers and legal experts must communicate with marginalized populations and grassroots organizations to fully comprehend the needs of all individuals impacted by the family law system. Fair and inclusive solutions are more likely to be developed when various views and viewpoints are included in the decision-making process. Efforts should focus on implementing structural reforms that target the root causes of prejudice and inequality inside the system rather than just offering short-term solutions. Pakistan may only attain a fairer and more equal family law system using an all-encompassing and cooperative strategy.

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