

The Muslim Women (Protection of Rights on Divorce) Act, 1986; Challenges & Achievements

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Abstract: The Research Paper deals with the challenges and achievements in the Muslim Women (Protection of Rights on Divorce) Act, 1986 this act has many legal implications in itself because this Act has faced many challenges in his enactments although it is a achievements in terms of maintenance claim by Muslim Women. The paper has taken especial emphasis on Shah Bano Case and Daniel latifi Case because in two cases we have seen bigotry in the democratic mechanism of the country because in former judgment they held that maintenance under criminal procedure would be the precedent over the personal laws but in later case they recognized this act as just and reasonable for the maintenance of the Muslim women under which the women will entitled for maintenance only within Iddat period¹.

The paper has covered the Critical analysis of each and every Section of the Act and its legal implication as well It has its scope in the protection of Muslim Women and the primary question which revolves in and around the Research work is whether the claim of maintenance be governed by this particular act or the provisions of the Criminal procedure. This paper has included Bigotry in a democracy and arbitrary rule of legislature. This paper contains recommendation for the improvement in the provisions of the act regarding “Divorced Muslim wife is not entitled to get maintenance beyond Iddat Period”² and clarify the ambit of the maintenance by this act and the maintenance by the criminal procedure.

I. RESEARCH METHODOLOGY

1. *Scope And Objective Of The Study:-*

The main objective of the study is to focus on Reasonable and fair provisions to the Muslim divorced women in regard their rights which they are entitled post-divorce which is very analytical in nature and also the study has extended its scope to the applications of each and every section of the above act and its critical and legal implication. The study includes the test of the Act on the venture of the constitutional validity. The study includes Politics of Muslim Personal Law and struggle for Life with dignity and Justice of the Muslim women. The study has provided a brief comparative analysis with the maintenance policy of the present act and under criminal procedure, 1973 and concluded the study with recommendation to liberalized the present act and should reasonably justify the constitutional provisions. The study has focused on the loop holes of the act and also have positive features in regard to the rights of the Muslim Divorced Women.

¹ Section 2 (b) "Iddat Period" means, in the case of a divorced woman,- (i) three menstrual courses after the date of divorce, if she is subject to menstruation; (ii) three lunar months after her divorce, if she is not subject to menstruation; (iii) if she is enceinte at the time of her divorce, the period between divorce and delivery of her child or the termination of her pregnancy whichever is earlier

²Section-3{1} of Muslim women (protection of rights on divorce) Act, 1986 (25 of 1986).

2. *Research Methodology:-*

The adopted method for this research is foreign **IRAC method** which primarily deals with **Issues** i.e. “Research Question” and then **Rules** which include laws and regulation of the act and then **Analysis** includes critical analysis and legal analysis and the **Conclusion** which includes suggestions and answers to the research questions in brief. The study of the research paper materialistically relied on the books of the different authors, articles and different case laws based on the extent of the present act. The material recommended and the suggestions given in the consultation with the faculty of the concerned subject in very helpful. “THE STUDY OF THE RESERCH PAPER IS TOTALLY DOCTRINAL IN NATURE”

3. *Research Questions:-*

- A) Whether the Muslim Women (Protection of Rights on Divorce) Act, 1986 is constitutionally valid or not?
- B) Whether it is just and reasonable to give maintenance till the Iddat period only?
- C) Whether the divorced Muslim women can claim maintenance from her former husband under procedure of criminal code or not?
- D) Whether the Triple talaq judgment is competent to provide dignity and justice to the Married Muslim women?

II. HYPOTHESIS OF THE RESEARCH WORK:-

The life of the Muslim Women is somewhat conservative as compare to the women of other religion and this nature has given scope to form a patriarchal dominance in this religion. In this religion we see clear violation of the rights of women by some provisions such as oral divorce, polygamy and the right to maintenance, the laws need to be reformed to address these issues.

After a nationwide survey in 1996, I found that Muslim women themselves wanted this change in laws. Of the *“families surveyed 7% had polygamy in practice; 30% families had one or more divorced women showing a clear evidence of oral talaq; the period of marriage after which talaq was pronounced ranged from less than one year to four-five years; and the reasons mentioned by these women were dowry (44%), anger (32%), second wife (16%), no son/daughter (4%). Divorced women who had to leave home immediately was 92% of the respondents. All of them said they need proper maintenance. The mehr – which is an amount the husband is supposed to return after talaq – was less than Rs 500 in 76% of the cases.”*³

This Act is a compulsion to solve the dispute between the personal law and criminal procedure code because it hinders the rights of the Muslim women then the famous judgment of Shah Bano came in which the court clarified that the maintenance of the divorced Muslim Women will seized post Iddat period only when the

³Awaz-e-Niswan (1999): Muslim Personal Law and Women – A Report of the national Conference (Bombay: Awaaz-e-Niswan).

women is capable of maintain herself but if contrary was a case then husband is liable to pay post Iddat period and women can claim maintenance under the Code of criminal procedure.

This lead to lots of cohesion between the personal law boards and their community as well, they started making pressure over the then government which results this act in 1986 which is more to gain political interest rather than providing protection to the rights of the Muslim divorced women.

The critical analysis of the act provide that the provisions of the act is restrained the options of the Muslim women and confining their post-divorce rights only to this Act which is hindrance in the right to equality of women in comparison to women of other religion which is very much sorrowful for the democratic country like India which follow the principle of secularism but due to the political interest of the parties they allow the personal law to override the constitutional provisions as well.

III. PREAMBLE

The Act has enacted to give a protection to Muslim Women who got married under the obligations and rituals of the Muslim laws and got divorced by the same marriage under the obligations of Muslim laws then this act will provide protection to the rights of the Muslim Women post-divorce. This Act clarifies the Ambit of divorce and include *Talaq, Ila, Zihar, Talaq-i-Tafweez and other forms of divorce*⁴. This Act did not intend to interfere with or abrogate any rights of divorce. The research will focus on the challenges which the Muslim Women has faced before the enactment of this act and how they fought for the justice and dignity of their rights of herself and how the act has worked as a catalyst to lead a conducive lifestyle thereon and this act provide options to the maintenance because it gave scope to move to statutory provisions of criminal procedure in some cases which is better option to preserve the legal rights of divorced as well as the religion because Muslim religion is one of the most diversified and it consist of many sources of laws and schools of thought. The Act makes provisions for the maintenance of a divorced Muslim women during and after the period of Iddat and also for enforcing her claim to unpaid dower and other exclusive properties. So it is very important to come to a proper philosophy of this Act which to my mind is as follows:-*“When marriages break up, a women suffers from emotional fractures, fragmentation of sentiments, loss of economic and social security and, in cases inadequate requisites for survival. A marriage is fundamentally unique bond between two parties when it breaks the dignity of the female fame got corroded. It is the laws duty to recompense and primary obligation is on that of the husband”*.⁵

IV. INTRODUCTION AND HISTORICAL BACKGROUND OF THE ACT:-

The Act has implemented to preserve the rights of the Muslim Women because in India Muslim community has treated the Women as a property and marriage as a civil contract. The women has faced many

⁴Arab Ahemadhia Abdulla v Arab Bail Mohmuna Saiyadbhai, AIR 1988 Guj 141; (1988) 1 Guj LH 294.

⁵See, Soli J. Sorabjee, Rule of Law: Its Ambit and Dimension, RULE OF LAW IN FREE SOCIETY 5 (N.R. Madhva Menon ed., 2008).

challenges to survive in the conservative nature and environment which in actual hinders the development of Muslim women in Society. The major change in Muslim Personal Law happened after the infamous Shah Bano case⁶, which led to the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986. This act actually deprived Muslim women of the right of maintenance under Section 125 of the Criminal Procedure Code, and thereafter this created a big upheaval in Indian politics. It created an impression that keeping an eye on the Muslim vote bank, the then Rajiv Gandhi government allowed itself to get influenced and pressurized by the Muslim leadership. Many Muslim women's organizations, other women's organizations, and progressive organizations protested, but could not stop it. The Act came into force and this act is infringing constitutional provisions of right to equality at its literal reading but this contention was rejected in **Daniel latifi case**⁷the supreme court held that this act is constitutionally valid and its aim is not to penalize the husband and a separate law for a community on the basis of personal laws applicable to such community, cannot be held discriminatory this point was answered in my *first research issue* .

The other facet of the study is reasonable and fair provisions and maintenance although this act has given proper rules for getting dower or mahr, gifts, and any other object or item which belongs to the divorced women she is entitled to get it back which is reasonable and fair provisions but providing the maintenance only within the Iddat period and then letting her depend upon the relatives is fair or not will be discussed in the *Second research issue*

The women irrespective of their religion can claim maintenance under code of criminal procedure when the women is unable to maintain herself so long as she had not remarried. Initially, it was provided in the CrPC(earlier under section 488) that only a wife is entitled to maintenance by husband. It was claimed by the husbands that once dissolution takes place, a woman ceases to be a wife and hence is no longer entitled to maintenance. However, in Muslim law, taking a divorce is relatively easier and hence, it led to situations where the same was being misused by the husbands. Looking at this loophole, an amendment was made in 1973, wherein **under section 125**⁸, a divorcee was entitled to maintenance till the time she remarries. Being secular in nature, this provision applies to all women, including Muslim Women. But confining this provisions of Code of criminal procedure under the exceptional cases by this act is actually an effect to Right to Equality. This type of issue will be dealt in *third research issue* .

The latest innovation or advancement brought by the Supreme Court is triple talaq judgment which gave a huge relief to the Muslim women in terms of protection of their rights post-divorce and it was helpful in empowerment of women in every sector of society.

⁶Mohd. Ahmed Khan v. Shah Bano Begum AIR 1985 SC 945.

⁷Danial Latifi and Another v. Union of India (2001) 7 SCC 740.

⁸Section 125; Order for maintenance of wives, children and parents Subs. by Act 45 of 1978, s. 12, for" Chief Judicial Magistrate" (w. e. f, 18- 12- 1978).

Thanks to the historic judgment of a five-judge bench of the Supreme Court declaring the practice of unilateral divorce (also known as **triple talaq or talaq-e-biddat**⁹) unconstitutional, it is now unequivocally established that the practice – which runs counter to the gender jurisprudence evolved by the Supreme Court, the principles of equality as ordained in the constitution, international human rights law and the Quran – is not fundamental to the religion of Islam in India.

The Supreme Court has consulted and cited the laws of as many as 19 countries including Egypt, Pakistan, Turkey and other nation-states from the Arab peninsula, South-East Asia, and South Asia that have abolished triple talaq. Arab countries such as United Arab Emirates, Egypt, Kuwait, Algeria, Iraq, Jordan, Lebanon, Libya, Morocco, Sudan, Syria, Tunisia and Yemen have enacted laws against the practice of triple talaq. Triple talaq is not Islamic and is a departure and deviation from the tenets of the Quran to undermine the rights of Muslim women. This kind of study will be matter of my **fourth research issue will be answered thereafter.**

V. CONSTITUTIONAL VALIDITY OF ACT:-

Antithetical To Quran:

The constitutional validity of the act was challenged in the Supreme Court that it is violative of Article-14,15 and 21 of the constitution of India the first and foremost ground on which it could be challenged is that it is antithetical to what the holy Quran mandates and where the liability to maintain the wife after the expiration of the Iddat period is that of the husband there would be absolutely no justification for putting the burden of the same over the women's family or for that matter even the **state wakf board**.¹⁰

Violative Of Right To Equality:

The second contention of this topic is that Section 125 is a provision made in respect of women belonging to all religions and the exclusion of Muslim women from its scope is discriminatory between Muslim women and women in general. It also nullified the decision in the Shah Bano Begum case. Moreover, it also undermines the secular characteristic of our Constitution. Therefore, it is in violation not only of equality before the law, but also of equal protection of laws under Article 14. If the object of Section 125 is to prevent vagrancy, the remedy under it cannot be denied to **Muslim women**¹¹.

There are certain argument by the personal law board and state as well which are opposing the contention

⁹See, <https://thewire.in/170271/triple-talaq-judgement-sc-upheld-the-supremacy-of-quran-within-the-constitution-of-india> .

¹⁰Kavita R. Khory, *The Shah Banu Case: Some Political Implications*, in *RELIGION AND LAW IN INDEPENDENT INDIA* 153 (2nd ed., 2005). See also Subhashini Ali, *Shah Bano judgment was a landmark in our social and political history*, India Today, December 26, 2005, Available at <http://indiatoday.intoday.in/story/shah-bano-judgement-was-a-landmark-in-our-social-and-politicalhistory/1/192383.html> visited on 09/02/14; MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 173 (1st ed., 2000).

¹¹Kusum , *family law lectures*, 2003, pp. 214-16.

mentioned above in the Daniel latifi case¹² they are of the belief that the Act of the legislature is constitutionally valid as it was enacted to respect and preserve the personal laws of Muslims, which is a legitimate basis for making a differentiation and that a separate law for a community on the basis of personal law applicable to such community, cannot be held to be discriminatory, and therefore, the Act does not offend Article 14 of the Constitution.

The aim of the Act is not to penalize the husband but to avoid vagrancy and destitution and Section 4 of the Act makes provisions for such a situation. Even if there is a denial of the remedy under Section 125 of the Code, such a course would not lead to vagrancy in light of Section 4 of the Act. Hence, the fact that the benefits of Section 125 of the Code have not been extended to Muslim women, would not necessarily lead to a conclusion that there is no provision to protect the Muslim women from destitution; that therefore, the Act is not invalid or unconstitutional. The Shah Bano case wrongly interpreted the word “**Mata**”, which actually is obligatory, only in typical cases of divorce before consummation, to the woman whose mahr was not stipulated and deals with obligatory rights of maintenance for observing Iddat period or for breast-feeding the child.

VI. INTERPRETATION OF THE SUPREME COURT:-

The Supreme Court while interpreting the constitutional validity of the act has summed up with some ratios which are as follows.

The former husband of a divorced Muslim wife is liable to make a reasonable and fair provisions for the future of such divorced wife which obviously includes her maintenance as well. Liability of Muslim Husband towards his divorced wife to pay maintenance is not confined to Iddat period. It would extend to the whole life of the divorced wife unless she got married for a second time.

Interpretation Of Fair And Reasonable Provisions Of The Act:

While interpreting the provision of Sections 3(1) (a)¹³ and 4¹⁴ of the Act, it held that a divorced Muslim woman is entitled to a fair and reasonable provision for her future being made by her former husband, which must include maintenance for future extending beyond the Iddat period. It was held that the liability of the former husband to make a reasonable and fair provision under Section 3(1) (a) of the Act is not restricted only for the period of Iddat but that divorced Muslim woman is entitled to a reasonable and fair provision

¹² (supra); page-6.

¹³Section-3(1)(a) Mahr or other properties of Muslim woman to be given to her at the time of divorce

Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to- a reasonable and fair provision and maintenance to be made and paid to her within the Iddat period by her former husband.

¹⁴(4) If any person against whom an order has been made under sub-section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or mahr or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973, and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defense and the said sentence being imposed according to the provisions of the said Code.

for her future being made by her former husband and also to maintenance being paid to her for the Iddat period.

A lot of emphasis was laid on the words made and paid and were construed to mean not only to make provision for the Iddat period but also to make a reasonable and fair provision for her future.

On my analysis of the act and more specifically the maintenance provisions it appears to be , prima facie violative of Article 14 of the constitution of India which mandates equality and equal protection of laws to all persons and also this act is violative of article 15 which prohibits discrimination on ground , inter alia , of religion. It, however observed that the validity or otherwise of a statute would depend on the interpretation of the same and court decided to interpret it in a manner so as to uphold the validity of the Act on the ground that **“Legislature does not intend to enact unconstitutional law”**¹⁵

The interpretations of the Act clearly evident that it is against the Holy Quran and also against the right to equality and the directive for uniform civil code enshrined in the constitution of India. Thus it is the need of the hour to do away a huge change in the present Act.

CASE-LAW- DANIEL LATIFI v. UNION OF INDIA:-

Explanation of the proposition of the Court:

“The word 'provision' indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her cloths, and other articles. The expression "within" should be read as "during" or "for" and this cannot be done because words cannot be construed contrary to their meaning as the word "within" would mean "on or before", "not beyond" and, therefore, it was held that the Act would mean that on or before the expiration of the Iddat period, the husband is bound to make and pay a maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filling an application before the Magistrate as provided in Section 3(3) but nowhere the Parliament has provided that reasonable and fair provision and maintenance is limited only for the Iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.”

Position of law:

It further stated that if a woman doesn't remarry she has the recourse under section 4 of the Act against her relatives in proportion of the properties they shall inherit after her death. If the relatives are not in a position to the, the judicial body can order the WAKF Board to pay for the maintenance of the woman.

¹⁵Tyabji , Muslim Law, Edn. 4 , p.274.

VII. CRITICAL AND LEGAL IMPLICATION OF THE ACT:-

The Act extends to the whole of India except the State of Jammu and Kashmir. The objectives of the Act as set out in the preamble read: "An Act to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto". Section 2¹⁶ of the Act deals with the definitional part of the legislation. The term 'Divorced Women', 'Iddat Period', 'Magistrate' and 'Prescribed' are defined under the Section 2 of the Act.

Section 3 of the Act deals with the Mahr or other properties of a Muslim woman to be given to her at the time of divorce. Sub-clause (a) of clause (1) of Section 3 deals with a reasonable and fair provision and maintenance within the 'Iddat period' by her former husband. Prima facie it seems that under this Section parliament had not intended to impose obligation on the husband after the Iddat period.

Fortunately, the Supreme Court in *Danial Latifi and Other v. Union of India* the supreme court has clarified the issue that *"The contention that the expression "within" in Section 3(1)(a) should be read as "during" or "for" cannot be accepted because words cannot be construed contrary to their meaning as the word "within" would mean "on or before", "not beyond" and, therefore, it was held that Act would mean that on or before the expiration of Iddat period, the husband is bound to make and pay maintenance to the wife and if fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3) but nowhere has Parliament provided that reasonable and fair provision and maintenance is limited only for the Iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time"*

In Musarat Jahan v. State of Bihar¹⁷– The Patna high court held that under Section – 3(1) (a) of the Muslim Women Act, 1986 a divorce Muslim Women would be entitled to maintenance continuously and beyond Iddat period till she remarries or she is able to maintain herself.

In Sayeed Khan Faujdar Khan v. Zaheba Begum¹⁸– Where withdrawal of earlier application for maintenance under section 125 of the CrPC, by Muslim wife on the basis of settlement arrived at between

¹⁶Section-2. Definitions.

In this Act, unless the context otherwise requires,-

- (a) "divorced woman" means a Muslim woman who was married according to Muslim law, and has been divorced by, or has obtained divorce from, her husband in accordance with Muslim law;
- (b) "Iddat period" means, in the case of a divorced woman,-
 - (i) three menstrual courses after the date of divorce, if she is subject to menstruation;
 - (ii) three lunar months after her divorce, if she is not subject to menstruation; and
 - (iii) if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy, whichever is earlier;
- (c) "Magistrate" means a Magistrate of the First class exercising jurisdiction under the Code of Criminal Procedure, 1973 in the area where the divorced woman resides;
- (d) "Prescribed" means prescribed by rules made under this Act.

¹⁷AIR 2008 Pat 69: 2008 Cr LJ 933 (NOC): 2008 AIHC 708 (NOC0).

¹⁸AIR 2006 Bom 39: 2006 (1) ALJ (NOC) 82.

husband and wife the court held that wife would be stopped subsequently from claiming maintenance under section-3 of the Muslim Women Act, 1986.

In Sabina Bano v. Imran Khan¹⁹:- The court held that liability to pay maintenance is not confined to Iddat only. Husband has to make reasonable provisions for maintenance within Iddat period even for post Iddat period. Further court held that for this, separate petition under Section 125 is not required the act itself provide for the same.

VIII. APPLICATION OF PROVISIONS OF MUSLIM WOMEN'S ACT, 1986

Section-4. Order for payment of maintenance

(1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where a Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the Iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order: .

(2) Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may, by order, direct the State Wakf Board established under section 9 of the Wakf Act, 1954, or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order.

Analysis of the above provision

Its first clause provide that where magistrate is satisfied of the fact that the divorced women has not married and she is incapable of maintaining herself post Iddat period , the court may order the relatives of the divorced women who would entitled to inherit her property on her death according to Muslim law, have to pay a reasonable amount to her, if the divorced women has children then they have to maintain if not then the parents of the divorced Women, the magistrate shall take into account the standard of living enjoyed by such women during her marriage and also means of the relatives on whom the liability is cast upon. The

¹⁹AIR 2009 (NOC) 1018 (MP).

liability of the relatives to pay maintenance shall be in proportions of their respective shares in her property. The magistrate may specify also the duration up to which the relatives are required to pay maintenance.

It is significant to note here that under Muslim Women Act, 1986 the Wakf board may be liable to maintain a divorced woman only where she has no parents, children, or other relatives or, where such person is not able to maintain her then finally the proceeding against wakf board initiated.²⁰

Constitutional analysis of Section-4 of Muslim Women's Act, 1986²¹:-

The second clause of the respective section was challenged before the Supreme Court that it was violative of Article 26 of the constitution of India but Kerala high Court has held that the provisions of section 4(2) of the Act was not violative of the Article 26 of constitution because wakf Board is not a "Religious Denomination" as incorporated under Article 26.

Application of section-5 of the Muslims women's Act:-

Section 5 of the Act offers choice to the parties to be governed by Sections 125 to 128 of the Criminal Procedure Code, 1973. According to Section 5 of the Act on the date of the first hearing of the application under sub-section (2) of Section 3 of the Act, parties to the dispute (i.e. divorced woman and her former husband) may resort to remedies under **Sections 125 to 128 of CrPC., 1973²²**.

For the purpose of this Section, the date of the first hearing of the application according to explanation provided under Section 5 of the Act means the date fixed in the summons for the attendance of the respondent to the application. For the application of Sections 125 to 128, an 'affidavit' or 'declaration' in writing from both the parties is necessary.

An 'affidavit' or 'declaration' according to Section 5 may be made either jointly or separately. As word '**and**' is used in the Section, an affidavit by both the parties is mandatory. Further, word '**may**' has been used in Section 5 of the Act, therefore, application of Sections 125 to 128 of Cr. P. Code 1973 is discretionary, and it has provided discretion to the parties, to be governed or not to be governed by Sections 125 to 128 of the CrPC. 1973. Since Sections 125 to 128 of Cr. P. Code 1973 are dealing with criminal liability, the discretion to apply it under Section 5 of the Act has several adverse legal and jurisprudential implications.

²⁰Tamil Nadu Waqf Board Secretary v. Syed Fatima Nachi, AIR 1996 SC 2423: 1996 Cr LJ 3488.

²¹Syed Fazal Pookoya Than gal v. Union of India, AIR 1993 Ker 308 : ILR 1993 (3) Ker 464: 1993 (1) Ker LT 860.

²²Sections 125 to 128 of Cr. P. C. deals with the orders for maintenance of wives, children and parents. According to clause 1 of section 125 of Criminal Procedure Code, 1973, if any person having sufficient means neglects or refuses to maintain: (a) his wife, unable to maintain herself, or (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or (c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or (d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother.

In Mohd Hanif A.kadar v. Mehrunisha Hapumiya Shaikh – When both are in collaboration that they will be remedied by the code of criminal procedure this does not seized their right to proceed through the Muslims women's Act, 1986 they shall be so optioned perennially or perpetually.²³

Application of section-7 of the Muslims women's act, 1986:- Section -7 of the Act lays down that every application by the divorced woman under Section-125 or 127 of the CrPC pending before a magistrate on the commencement of this Act shall be disposed by such magistrate in accordance with the provisions of the act provided the parties have not opted under section-5 of the Act that they want their case to be decided under the CrPC. However, Andhra High court has held that operation of provisions of section 125 or 127 of the CrPC are excluded on the commencement of the Muslim Women Act, 1986.

The court observed that the Application filed under section 125 of the CrPC pending before the magistrate shall be disposed of in accordance with the provisions of the Act 1986²⁴

Explaining the term “Pending application” Bombay high Court has held that it include also such “revision applications” which were pending before the magistrate on the commencement of the Act. Applications for revision are deemed to be continuance of proceeding and such application would also be disposed off under the Muslim women Act²⁵.

IX. CHALLENGES IN THE ACT AND THEIR LEGAL IMPLICATION:-

1. Surrender Of Sovereign And Constitutional Power

In India, power of delegation is derived from and governed by the Constitution of India. The Parliament has to use the above mentioned power in the right spirit. The ruling party shall not use this power for vested political interest or as a vote-bank. Section 5 of the Act delegated power to apply law to the individual governing subject itself. Therefore, the Act suffers from the vice of excessive delegation.

*In Municipal Corporation of Delhi v. Birla Cotton, Spinning and, Weaving Mills Delhi & Anr*²⁶., the court has observed that “the Constitution entrusts the legislative functions to the legislative branch of the State, and directs that the functions shall be performed by that body to which the Constitution has entrusted and not by someone else to whom the legislature at a given time thinks it proper to delegate the function entrusted to it”.

The Rajiv Gandhi government had surrendered sovereign and constitutional power by delegating powers under Section 5 of the Act. There is always a possibility of surrendering sovereign and constitutional powers for some or the other reason. Therefore, in every civilized State, there is a constitutional mechanism and guarantee provided against such tendencies. Unfortunately, the above mentioned constitutional mechanism

²³AIR 2010 (NOC) 808 Guj.

²⁴Usman Khan Bahamani v Fathimunnisa Begum, AIR 1990 AP 225 : 1990 CrLJ 1364: 1990 Mat LR 261.

²⁵<http://www.indianexpress.com/news>.

²⁶See, Municipal Corporation of Delhi v. Birla Cotton, Spinning and, Weaving Mills Delhi & Anr. 1968 AIR 1232, 1968 SCR (3) 251.

and guarantee could not prevent Parliament in the present instance. Surrendering or delegating the above mentioned sovereign and constitutional power to the governing subject should be declared as excessive, unconstitutional, invalid and against basic objectives of delegation of legislative power in a democratic system.

2. *Biogotry Of Democracy-*

The fallacy in a democratic system is that the 'will of the people' is authoritative and ought to prevail. Arbitrary majoritarianism is fundamentally a set of voter's ideology or preferences. This apparently presents a major difficulty, a difficulty traditionally known as 'the problem of inclusion'²⁷ i.e. inclusion of unwanted, neglected or oppressed by the representatives of a set of voters in majority. To defend 'the will of the people' irrespective of how it has come about, whether through ignorance and prejudice or impartial information, quickly leads to another conflict between rationality and politics in what is known as the 'paradox of democracy'. The party in majority may bestow advantages to a class based on some logical ground or for mere political consideration, which are known as "informed preferences" and "prejudicial preferences." "Informed Preferences" or decisions are based on some factual information or it has some logical or rational basis. "Prejudicial preferences" are biased preferences or preferences based on irrelevant or mere political considerations. In a democracy, it is difficult to draw an exact line between "informed preferences" and "prejudicial preferences". "Prejudicial preferences" are not legitimized in the era of constitutional democracy. The "prejudicial preferences" are not only against established 'international legal ideology²⁸' but also modern democracy and the Constitution of India.

In a democracy, a forum (i.e. Parliament) for free discussion and deliberation is not created to dominate the disadvantaged, fragile person or group. Deliberations and discussions are crucial for preserving and protecting "rationalism" or "informed preferences". Legalization of "irrational dominance" is further controlled and regularized by the Constitution. An honest democrat shall not support and tolerate "democracy" or appeasement policy in a democratic system. Section 5 of the Act is not only against common right or reason but also a clear example of *prejudicial preferences*²⁹ without any rational basis.

X. COMPARITIVE ANALYSIS OF THE ACT

1. *Muslim Personal Law V. Code Of Criminal Procedure:-*

Under Islamic or Muslim law, men are allowed to practice polygamy, meaning they have a right to marry more than one wife at one point in time, though the upper limit is four. Unlike Hindu law, such marriage,

²⁷GORDON GRAHAM, THE CASE AGAINST THE DEMOCRATIC STATE: AN ESSAY IN CULTURAL CRITICISM 36 (2002).

²⁸It is important to note that the Universal Declaration of Human Rights (UDHR), 1948 in its preamble has expressly pointed out that human rights shall be protected by rule of law. The rule of law and right of equality (i.e. Human Right) do not tolerate the "prejudicial preferences.

²⁹"Prejudicial Preferences" are unreasonable classifications and therefore against right of equality granted and protected under Article 14 and other Articles of the Constitution of India.

while the first marriage subsists is not declared void. Hence, a second wife is entitled to all the rights as the first. The wife of a Muslim man, whether she is the first wife or the second, has the right to claim maintenance from her husband. From the time she is old enough for matrimonial intercourse, the Muslim husband's duty to maintain her arises. However, the death of the husband puts an end to **the right of the wife to claim maintenance**³⁰. Prior to *Mohammad Ahmed Khan v. Shah Bano Begum*, a Muslim wife was not entitled to claim maintenance after the completion of her Iddat period. Shah Bano was a 62-year-old Muslim woman. Her husband divorced her and she filed a criminal suit in the Supreme Court of India. She claimed maintenance and the same was granted in her favor.

It was held that, a Muslim wife is entitled to the right to claim maintenance under Section 125 of Criminal Procedure Code even after the expiry of Iddat period as long as she is not remarried and she is not able to sustain herself from the dower received at the time of divorce. Yet, the Indian Parliament reversed the judgment, and consequently, she was denied the right to claim alimony. The judgment raised controversies among Muslims since the judgment was in conflict with Islamic Law. With this case the Muslim Women (Protection of Rights on Divorce) Act, 1986 was passed, which diluted the judgment of the Supreme Court and denied the right to claim maintenance to a Muslim woman from her former husband.

Under Muslim Personal Law, a woman is entitled to maintenance only till the end of the Iddat period. Iddat is the period when co-habitation of the parties end, on the expiry of Iddat the spouses will stand divorced. The period of Iddat consists of three menstrual cycles or three lunar months, in case of pregnant women, the Iddat period would extend up to the time of delivery³¹. Hence, we can see a direct conflict, since CrPC does not recognize Iddat period and maintenance goes beyond the same.

Secondly, in Muslim Law, polygamy is permitted, and under section 125, marriage to another woman becomes a ground for claiming maintenance. In *Mohammed Haneefa v. Mariam Bi* -the Court stated that in case of a clash between personal law and CrPC, the former shall prevail. This position was seconded by the Supreme Court in *Saira Bano v A.M Abdul Gafoor*³².

This caused a lot of dilemma in the legislature. To resolve this dilemma, Section 127(3) was added under which that if a divorced woman receives an amount due to customary or personal laws of the community, the magistrate can cancel any order for maintenance in her favour.

Judicial Decisions interpreting the Scope of Section 127

However, since the judiciary favored the right of women to claim maintenance, the conflict continued. It was held in *Bai Tahira vs. Ali Hussain Fissalli Chothia*³³ that payment of "illusory sums" focused around

³⁰<http://www.lawteacher.net/family-law/essays/maintenance-of-wife-under-hindu-law-essays.php>.

³¹Khan Ephroz , " Women and Law : Muslim Personal Law Perspective" Rawat Publications , 2003.

³²AIR 1987 SC 1103.

³³ 1979 AIR SC 362.

the Muslim personal laws ought to be considered to diminish the measure of maintenance payable by the spouse, however that does not acquit the spouse from the commitment in light of the fact that each lady independent of her religion is entitled to maintenance. The divorced wife has this right except from when the aggregate payment stipulated by custom is pretty much sufficient to substitute the maintenance.

Thus the spirit behind Section 127(3)(b) is that a wife can't profit from both, unless the whole sum paid under the customary law is deficient. An extra requirement was included by the Apex court in *Fuzlunbi v. K Khader Vali*. The instalment of the sum focused around Muslim law must be pretty much identical to the month by month maintenance to the divorcee, required till her remarriage or demise, with a specific end goal to substitute the maintenance recompense commitment.

The Supreme Court expressed in *Zohar Khatoon vs. Mohd. Ibrahim* stated that the expression "wife" in S.125 and S.127 of CrPC incorporates Muslim ladies who get separated by method for Talaq or under the Dissolution of Muslim Marriage Act, 1939.

Therefore, the conflict between Muslim Personal Law and CrPC still continued, and section 127 was not sufficient to satisfy the Muslim community who opposed section 125 as a detriment to their personal laws. It was in this context of growing conflict and dissatisfaction that the famous *Shah Bano Case* surfaced and went on to become the most landmark judgment in this subject matter.

XI. COMPARISON WITH FOREIGN LEGISLATIONS

1. **Algeria**³⁴: Is a theocratic State, which declares Islam to be its official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted in *“Article 49. Divorce cannot be established except by a judgment of the court, preceded by an attempt at reconciliation for a period not exceeding three months.”*
2. **Egypt**³⁵: Is a secular State. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the legislations- *“Article 1. A Talaq pronounced under the effect of intoxication or compulsion shall not be effective.”*
3. **Morocco**³⁶: Is a theocratic State, which declares Islam to be its official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the legislations as – *“Article 79. Whoever divorces his wife by Talaq must petition the court for permission to register it with the Public Notaries of the area where the matrimonial home is situate, or where the wife resides, or where the marriage took place”*.

Article 81 states *“The court shall summon the spouses and attempt reconciliation. If the husband deliberately abstains, this will be deemed to be withdrawal of the petition. If the wife abstains, the*

³⁴<http://www.rediff.com/news>.

³⁵ Mulla, Principles of Mohammedan law, Ed.18, p. 385.

³⁶R.K.Singh, Rights of Senior Citizen ;,need of the hour, Indian Bar Review, Vol. 33, 2006, p. 130.

court will notify her that if she does not present herself the petition may be decided in her absence. If the husband has fraudulently given a wrong address for the wife, he may be prosecuted at her instance.”

Article 82 states *“the court will hear the parties and their witnesses in camera and take all possible steps to reconcile them, including appointment of arbitrators or a family reconciliation council, and if there are children such efforts shall be exhausted within thirty days. If reconciliation takes place, a report will be filed with the court of reconciliation attempts fail, the court shall fix an amount to be deposited by the husband in the court within thirty days towards payment of the wife’s post-divorce dues and maintenance of children.”*

Analysis of the foreign legislations:

It was seen in the above legislations that they are not democratic countries they are purely a Islamic states where majority is of Muslims and they follow Quran as their epical source of law and shariat as their guiding principle and they also give proper status to the Muslim Women and more specifically divorced Muslim Women they gave a proper procedure to fix an amount which will be given post-divorce and score also be taken for the children born out of their sexual intercourse but it is unfortunate that democratic country like India which believe in Rule of law and secularism is got beaoned before blind interpreter of Holy Quran who has interpreting it so wrongly and this act is result of that interpretation. In our country we are unable to give equality to Muslim Women until we take out huge reform towards Uniform Civil Code in India.

XII. LATEST ACHIEVEMENT-: TRIPLE-TALAQ JUDGMENT-

A disapproved form of divorce is talaq by triple declarations in which three pronouncements are made in a single tuhr, either in one sentence e.g. ‘I divorce thee triply or thrice’ or in three sentences ‘I divorce thee, I divorce thee, I divorce thee.’ Such a talaq is lawful, although sinful, in Hanafi law; but in Ithna Ashari and the Fatima laws it is not permissible. This is called talaq al-ba’in, irrevocable divorce.

Another form of the disapproved divorce is a single, irrevocable pronouncement made either during the period of tuhr or even otherwise. This form is also called talaq –e-biddat and may be given in writing. Such a ‘bill of divorcement’ comes into operation immediately and severs the marital tie. This form is not recognized by the Ithna Ashari or the Fatimi schools.³⁷”

This being the case, it is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right contained under

³⁷Cheater v. Cater ([1918] 1 K.B. 247) Pickford, L.J., after citing a passage from the judgment of Mellish, L.J., in Erskine v. Adeane ((1873), 8 Ch. App. 756), said ([1918] 1 K.B. 252.

Article 14 of the Constitution of India. In my opinion, therefore, the 1937 Act³⁸, insofar as it seeks to recognize and enforce Triple Talaq, is within the meaning of the expression “laws in force” in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq.

ORDER OF THE COURT – **“In view of the different opinions recorded, by a majority of 3:2 the practice of ‘talaq-e-biddat’ – triple talaq is set aside”**

Analysis of the Judgment-

The judgment has given a very deep happiness to the married Muslim Women who has suffered a lot in their matrimonial life, they are treated as a property and they always restrained to the four walls of the house and they are always subjected to the threat of Talaq and social seclusion due to absence of protection on their rights after the divorce made them subservient to the males and the whole Muslim Women are suffering this type of problem. After a long time judiciary has interpreted it correctly and also in normal mindset it is antithetical to Quran as well as constitution of India in their literal interpretation. There is no mention of ‘talaq-e-biddat’ in the Quran. It was however acknowledged, that the practice of ‘talaq-e-biddat’ can be traced to the second century, after the advent of Islam. It was submitted, that ‘talaq-e-biddat’³⁹ is recognized only by a few Sunni schools. Most prominently, by the Hanafi sect⁴⁰ of Sunni Muslims. It was however emphasized, that even those schools that recognized ‘talaq-e biddat’ described it, “as a sinful form of divorce”. It is acknowledged, that this form of divorce, has been described as black spot on theology as it is wrong interpretation of the Quran.

XIII. RECOMMENDATION FOR THE MUSLIMS WOMENS ACT, 1986

Reasonable and fair provisions of maintenance-

The first and the foremost positive part of this act is that they are providing maintenance to the women in every phase till she remarry either by the husband or relatives or at the last by the State Wakf Board which is very huge development in comparison to old personal laws and by including this part they have given protection to life and dignity of the divorced Women and gave a medium to lead a better life in future with her financial security provided by the legislature with this Act .

The second face of this provision is little embarrassing because by this they are excluding the liability of the Husband who is prime culprit of this cause it is his primary liability to take care of her wife and give her a proper lifestyle to the wife and if he not do so it is anti to the Quran as well. If the husband who is regarded as a better half of wife is not maintaining her after divorce then it is not justified to put liability to the relatives and Wakf Board.

³⁸Shariat Act, 1937.

³⁹<http://www.thehindu.com/thehindu/2003/08/10/stories/2003081000221500.htm>.

⁴⁰<http://www.divorcelawyers.co.in/maintenance-concept-practice-for-muslim-women>.

So, in my suggestion we must restrict this liability to maintain the wife is only to husband and the direct relatives of the husband because they have direct interest with women after marriage not the women's relative she became the legal family member after marriage.

Section 125 to 128 of Criminal procedure-

This is the negative part of this Act because in section-5 of Muslims Women Act, 1986 it was inculcated that if both spouse agrees by affidavit that they will be governed through criminal procedure then only it will apply which is very wrong because the husband will never give affidavit to this kind of procedure where he has to give maintenance throughout until she remarries and legislature by incorporating this clause shows his intention to favor the Muslim husband by giving the way to escape from criminal procedural law which is a secular law in itself.

In my suggestion it is made optional to the wife to either go through the Criminal procedure or through personal laws by restraining the Divorced women by going through procedural law is effecting the beauty of democracy and Rule of law and section-5 of the Act be struck down forthwith.

Provide Speedy Justice:-

This act holds good in providing the speedy justice because previously the wife had to file a civil suit and she would get her property after the lengthy procedure of Civil procedure Code while this Act under Section 3(2)(3) and (4) procedure followed by the court is 'Criminal Procedure' which is speedy and gives faster relief to aggrieved Muslim Women.

In my suggestion these sections of this act is very effective in providing Dower and other exclusive properties of the wife so it should be used and implemented properly.

Correct interpretation of Quran

The Quran declares men as protectors, and casts a duty on them to maintain their women. In order to be entitled to the husband's support, the Quran ordains the women to be righteous, and to be devoutly obedient to the husband, even in his absence. 'Verse' 34, extends to the husband the right to admonish his wife who is either disloyal, or ill-conducts herself. Such admonition can be by refusing to share her bed, and as a last resort, even to beat her lightly. Thereafter, if the woman does not return to obedience, the husband is advised not to use means of annoyance against her. 'Verse' 35, sets out the course of settlement of family disputes. It postulates the appointment of two arbitrators – one representing the family of the husband, and the other the family of the wife. The arbitrators are mandated to explore the possibility of reconciliation. In case reconciliation is not possible, dissolution is advised, without publicity or mud-throwing or by resorting to trickery or deception. The Quran never supported "Talaq-e-biddat" nor social seclusion of the wife or women. In my suggestion the Quran should be interpreted correctly and few provisions of this Act is contradictory to Quran.

XIV. CONCLUSION

After forgoing discussions on the research issues we may conclude that under Muslim law, maintenance post-divorce has been a controversial subject matter. Initially, there were two sources from which the right to maintenance of a divorced Muslim woman emanate- these were section 125 of CrPC and the Muslim Personal Law. There was a conflict between the two since, under CrPC, the right of a woman to claim maintenance was beyond the Iddat period and under Muslim Personal Law, the husband was obliged to pay maintenance only during Iddat period. To resolve this, section 127 was inserted in CrPC, but this was unsuccessful in resolving the conflict and being a substitute for maintenance.

In this context, the famous Shah Bano Case was decided, which settled the position of law. The case gave precedence to CrPC over Muslim Personal Law, and stated that if the divorced woman does not have the means to maintain herself, that it is the obligation of the husband to maintain her for her entire lifetime, and hence, well beyond the Iddat period. This created lots of cohesion between the Muslim Community and the pressure over the government or the political interest of the ruling party came up with this Muslim Women's Act, 1986 which haven't serve the purpose although it made the restriction over the option of criminal procedure although this Act is beneficial in providing speedy justice in getting back the object given at the time of marriage.

Legalizing parallel discretionary system under Section 5 of the Act, has led to legalization and institutionalization of arbitrariness and raw power. "Law then is seen more and more as a system through which such power-grabbing and sharing is sought to be legitimated."⁴¹ Political parties have failed to promise that they would not hobnob with communal forces or not mix religion with their strategies of building vote banks, which is the biggest blow to secularism.

According to Roman jurist Cicero⁴²- "Law is the highest reason, implanted in the nature, which commands what ought to be done and forbids opposite...the origin of justice is to be found in law, for law is its natural force; it is mind and reason of intelligent man, the standards by which justice and injustice are measured"

⁴¹HENRY J. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE UNITED STATES, ENGLAND, AND FRANCE 7 (3rd ed., 1974). 39. UPENDRA BAXI, THE CRISIS OF THE INDIAN LEGAL SYSTEM 4 (1982)

⁴²See, JYOTI SHARMA. SECULARISM AND AYODHYA POLITICS IN INDIA 97 (2007).

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