

**RESPONSE BY PARTNERS FOR LAW IN DEVELOPMENT (PLD) TO THE QUESTIONNAIRE OF
THE LAW COMMISSION OF INDIA ON SECTION 498-A IPC**

Response to Question 1 and Question 2

The role of the Police in making arrests upon receiving a complaint under section 498 A

1. a) What according to you is ideally expected of Police, on receiving the FIR alleging an offence u/s 498A of IPC? What should be their approach and plan of action?

b) Do you think that justice will be better meted out to the aggrieved woman by the immediate arrest and custodial interrogation of the husband and his relations named in the FIR? Would the objective of s.498A be better served thereby?
2. a) The Supreme Court laid down in D.K. Basu (1996) and other cases that the power of arrest without warrant ought not to be resorted to in a routine manner and that the Police officer should be reasonably satisfied about a person's complicity as well as the need to effect arrest. Don't you agree that this rule applies with greater force in a situation of matrimonial discord and the police are expected to act more discreetly and cautiously before taking the drastic step of arrest?

b) What steps should be taken to check indiscriminate and unwarranted arrests?

In our opinion the law is adequately clear in relation to the role of the police – in terms of the specifying prompt action while setting out safeguards to protect the accused against insubstantial complaints. The combination of the two is critical to a good law, which takes serious note of domestic violence as a criminal offence while protecting the accused against frivolous and insubstantial accusations. To explain both aspects of the law – recognition of the severity of the offence and protections to accused we set out the following:

Section 498A of the Indian Penal Code is a cognizable offence, and consequently the police are empowered to register an FIR, investigate and arrest an accused person without a court warrant. These elements are fundamental to recognition that grave cruelty to women in the matrimonial home must be treated as a serious offence.

In fact it is absolutely essential to treat an offence under Section 498A on par with the other serious offences set out in the IPC. It was by the Criminal Law (Second Amendment) Act No. 46 of 1983, which received the President's assent on 25th December, 1983, that Section 498A was inserted in the Penal Code. The Statement of Objects and reasons states as follows:

“The increasing number of Dowry Deaths is a matter of serious concern. The extent of the evil has been commented upon by the Joint Committee of the Houses to examine the working of Dowry Prohibition Act, 1961. Cases of cruelty by the husband and the relatives of the husband which culminate in suicide by, or murder of, the hapless woman concerned, constitute only a small fraction of the cases involving such cruelty. It is therefore proposed to amend the Indian Penal Code, the Code of Criminal Procedure and the Indian Evidence Act suitably to deal effectively not only with cases of Dowry Death but also cases of cruelty to married woman by their in laws.”

It is relevant to stress that the social and political environment with regard to the rights and privileges of women in India has not gone through any substantial change for whittling down of Section 498A IPC and as a result no amendment needs to be made to Section 498A of the IPC, either procedurally or substantively. The law of arrest may continue to operate in accordance with the provisions of the CrPC and any amendment that needs to be brought about is mainly towards improving the processes of investigation and trial in a manner that

improves efficiency, gender sensitivity and with a justice oriented approach which will apply to the entire criminal justice system and no amendment need be brought about solely to water down the law of arrest with respect to Section 498A.

Further in order to ensure that an accused person is protected adequately the Code of Criminal Procedure (Amendment) Act 2008 made some important changes in the powers of the police to arrest without a warrant. The amendments brought about changes in section 41 and introduced 41A, 41B, 41C and 41D to the Cr.P.C reduce the powers of the police to act arbitrarily by stressing that arrest can be made without warrant any person:

- (a) Who commits, in the presence of a police officer, a cognizable offence
- (b) Against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence... (Section 41)

The above provisions place responsibility upon the police for establishing credibility of the complaint prior to making an arrest. Additionally, it requires the police officer to be satisfied that the arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the offence; or to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or as unless such person is arrested, his presence in the Court whenever required cannot be ensured. The police officer shall record while making such arrest, his reasons in writing.

Section 41D gives the arrested person the right to meet an advocate of his choice during interrogation, though not throughout interrogation.

These amendments provide greater transparency in the process of making an arrest in a case falling under section 498 A.

With regard to Question 1, it is expected that that the law adequately lays out the steps police must follow upon receiving an FIR alleging an offence under section 498 A IPC. We must emphasise however, that the nature of the offence of 498A is one where the accused and the complainant live in intimate proximity, under one roof, and risk of retribution to the complainant within the privacy of the home is a necessary and expected consequence of registering an FIR.

With regard to Question 2, we expect the police to act as per the law and follow the guidelines laid down by the Supreme Court in *D.K Basu vs State of West Bengal* [(1997) 1 SCC 416]. Arrest by the police officers in a cognizable case is often at the discretion of the police officer. In cases where the police act in respect of exaggerated claims, the flaw lies not in the legal provision, section 498A, but with the functioning of the law enforcement machinery. Likewise, it is important to point out that arrest of minors under section 498A is in contravention of the Juvenile Justice Act 2000. Actions such as indiscriminate arrests, detention of minors are a breach of the law by the law enforcement machinery, and must not be tolerated. Similarly, inaction of the police to complaints of 498A is also breach of the law, and undermines the legislative and social object and purpose of the provision.

Response to Question 3 and Question 9
Section 498 A and Bail

3. Do you think that making the offence bailable is the proper solution to the problem? Will it be counter-productive?
4. There is a view point supported by certain observations in the courts' judgments that before effecting arrest in cases of this nature, the proper course would be to try the process of reconciliation by counselling both sides. In other words, the possibility of exploring reconciliation at the outset should precede punitive measures. Do you agree that the conciliation should be the first step, having regard to the nature and dimension of the problem? If so, how best the conciliation process could be completed with utmost expedition? Should there be a time-limit beyond which the police shall be free to act without waiting for the outcome of conciliation process?
9. Do you consider it just and proper to differentiate the husband from the other accused in providing for bail?

We strongly emphasise that making cruelty and violence in the home a bailable offence will lead to a travesty of justice. Cruelty within the matrimonial home is systemic within India, with fatal consequences as evident from the NCRB statistics. It is for this reason that Sections 304B IPC and Sections 113A and 113B in the Indian Evidence Act were introduced. Under no circumstance should the law dilute grave violence, often leading to murder or abetted suicide in the matrimonial home in a trivial manner. Further, even offences such as voluntarily causing hurt to extort property, theft, extortion, criminal breach of trust, cheating are all considered as non-bailable offences and have been categorized as such based on the seriousness of each of the aforesaid offences against the person and his/her property. Section 498A is at the least, as serious and grave an offence as the aforesaid offences and hence under no circumstances can it be made a bailable offence. The law adequately protects persons accused even in non-bailable offences. While the accused may not be granted bail immediately; he must be produced before a magistrate within 24 hours of his arrest and can be released on bail on a surety or personal bond upon application for the same. Section 437 of the Criminal Procedure Code stipulates the conditions under which an accused maybe released on bail in a non-bailable case. Therefore a person accused under section 498 A can be released on bail provided certain conditions are met – and there is no violation of criminal justice principles involved in a non-bailable offence. The magistrate must be satisfied that no obstruction to the investigation or risk to the complainant results from granting of the bail – and judicial opinion thus balances both aspects of justice.

Additionally, subsequent to the amendment of Section 41 of the Cr.P.C, if an offence is punishable with imprisonment of less than 7 years a police officer must record reasons prior to making the arrest. Since Section 498A is punishable with imprisonment of upto 3 years arrest of an accused person may not always be carried out. Hence with these safeguards the rights of the accused person is protected but keeping in mind that the rights and safety of the complainant who could be threatened by her husband and his family members for filing a complaint against them it is absolutely unadvisable to make Section 498A a bailable offence.

Further , making an offence under section 498-A bailable (and therefore, giving an accused the right to get bail immediately) would have dangerous consequences for investigation and risk the life of the complainant. For this reason, the offence of section 498-A IPC must not be made bailable.

With regard to question 9, there is no justification for differentiating between the husband and the other accused persons with regard to providing for bail. Shared household is a

common phenomenon in India, and domestic violence law must bring all potential accused within its net, while providing the safeguards as outlined above available to all such accused.

It is pertinent to mention that in the judgements challenging the constitutionality of Section 498A, IPC, 1860, the Supreme Court and High Courts have rightfully upheld its constitutionality. The Courts have held “The offence contemplated is of cruelty by husband or his relatives. In the very nature of things, having regard to the social evil that was sought to be remedied, in our view, the classification is proper. In our view, there is a valid justification for classifying the husband and his relatives as a separate class for the purposes of Section 498A of IPC. Normally, the offence is committed within the four walls of the matrimonial home, where others have no easy access. There is no invidious discrimination nor is there anything obnoxious to the doctrine of equality so as to violate the guarantee enshrined in Article 14 of the Constitution.”(*Balkrishna Pandurang Moghe v. State of Maharashtra and Ors.*, II (1998) DMC 569).

Hence, even in providing bail there is no necessity of differentiating the family of the husband on no rational basis. Bail should be granted based on the already established principles of law and if the role of the family member is such that they were not party to the commission of the offence under Section 498A in the same manner as the husband. In the absence of mitigating circumstances the husband and family members should be treated on the same footing.

Response to Question 4, 5, 6, 8 and 10 **Section 498 A and Compounding the offence**

4. There is a view point supported by certain observations in the courts’ judgments that before effecting arrest in cases of this nature, the proper course would be to try the process of reconciliation by counselling both sides. In other words, the possibility of exploring reconciliation at the outset should precede punitive measures. Do you agree that the conciliation should be the first step, having regard to the nature and dimension of the problem? If so, how best the conciliation process could be completed with utmost expedition? Should there be a time-limit beyond which the police shall be free to act without waiting for the outcome of conciliation process?

The answer to this question may be given in the negative. In light of the gravity of the offence and in light of the fact that the woman may not have any support mechanisms it is not advisable to initiate reconciliation processes before effecting arrest since the aggrieved woman will continue in the same position of threat from the husband and his family members. In a situation where the woman does not want to reconcile with the husband and his family due to the cruelty she suffered at the hands of the husband and family, she should not be coerced into reconciling with them. Hence the woman should have a right to file a police complaint/private complaint in Court irrespective of whether reconciliation processes will be initiated or not. Conciliation can be initiated at any stage and the woman should be advised that she has the option to do so irrespective of the stage of the proceedings. Parties can go into mediation proceedings based in their respective States irrespective of the stage of the proceedings. Hence attempting to initiate the process of reconciliation before effecting arrest is counter-productive (except if it is at the behest of the aggrieved woman and if the crime committed is not grave) since it will rarely be at the behest of the aggrieved woman and is not in consonance with the spirit and letter of either Section 498A IPC or of the fundamental rights or of the directive principles of state policy which are guaranteed by the Indian Constitution.

5. Though the Police may tender appropriate advice initially and facilitate reconciliation process, the preponderance of view is that the Police should not get involved in the actual process and their role should be that of observer at that stage? Do you have a different view?

Since the police have not been trained to tender advice and counsel to either of the parties it is unadvisable for the police to facilitate reconciliation processes. The police may inform both parties that they have an option of resorting to mediation/legal services provided by the States at any stage of the proceedings irrespective of the filing of the complaint but they may not attempt to reconcile the parties. This in itself will reduce the allegation of corruption allegedly resorted to by the police while making attempts at reconciliation.

6. a) In the absence of consensus as to mediators, who will be ideally suited to act as mediators/conciliators – the friends or elders known to both the parties or professional counsellors (who may be part of NGOs), lady and men lawyers who volunteer to act in such matters, a Committee of respected/retired persons of the locality or the Legal Services Authority of the District?

b) How to ensure that the officers in charge of police stations can easily identify and contact those who are well suited to conciliate or mediate, especially having regard to the fact that professional and competent counsellors may not be available at all places and any delay in initiating the process will lead to further complications?

The aggrieved party can resort to Mediation if she thinks fit based on the facts and circumstances of each case. This does not curb her right to initiate legal proceedings against her husband and his family. In some States such as Delhi, a Mediation Centre has been set up by the Delhi government as a joint venture with the High Court of Delhi. Hence an aggrieved woman may approach the mediation centre at any stage of the proceedings, including at the stage before a complaint is registered. Trained mediators will try to arrive at an amicable settlement between the two parties, even if the settlement does not include reconciliation. It is necessary to study the impact of these mediation centres so that the same may be replicated in all districts.

An aggrieved woman should also be entitled to approach the Legal Services Authority of the State and trained lawyers who have a proficiency in social work and/or human rights and/or feminist studies must be the persons advising the woman and initiating legal action on her behalf whether or not the legal action will include an amicable settlement.

8. Do you think that the offence should be made compoundable (with the permission of court)? Are there any particular reasons not to make it compoundable?
10. a) Do you envisage a better and more extensive role to be played by Legal Services Authorities (LSAs) at Taluka and District levels in relation to s.498A cases and for facilitating amicable settlement? Is there a need for better coordination between LSAs and police stations?
- b) Do you think that aggrieved women have easy access to LSAs at the grassroots level and get proper guidance and help from them at the pre-complaint and subsequent stages?
- c) Are the Mediation Centres in some States well equipped and better suited to attend to the cases related to S,498-A?

The definition of 'cruelty' under section 498 A include acts that are lead to the death of the woman either through suicide or through murder. In such instances, compounding of the offence cannot be recommended as compromise can lead to the death of a woman. In principle, our stand is that violence of the nature covered by 498A cannot be compounded or compromised. However, we do recognize that in the absence of social welfare by the state, or legal provision for matrimonial property, in combination with the socio cultural pressures that operate upon women, they are compelled to compromise. The query relating to reconciliation and counseling is a moot one, in view of the fact that this is in fact an intrinsic part of the existing institutional responses to complaints. Although section 498A of the IPC is a non compoundable, the Crimes Against Women Cell established in cities, including in Delhi,

typically do not file FIR's but initiate counselling and mediation. The Delhi Legal Services Authority has commenced matrimonial LokAdalats for resolving cases relating to domestic violence.¹ Indeed, the LokAdalats cannot side with any party, but rather 'Every LokAdalat shall, while determining any reference before it under this Act, act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by the principles of justice, equity fair play and other legal principles' [section 20(4) of the Legal Services Authorities Act 1987].

Unfortunately, the prominent argument for the need to include alternatives channels of dispute resolution such as the LokAdalat, is to avoid delays and free up the formal courts, rather than ensure justice substantively. The paternalistic side of LokAdalats in seeking to conciliate couples who do not wish to reconcile, and their dangerous impact in seeking to compromise cases involving violence against women have been documented by Galanter and Krishnan.² PLD's experience of working with community organisations that provide crisis support is that compromises executed in cases of grave violence often eventually result in the death of the complainant.

Paragraph 16 (4) (5) of the Malimath Committee on Reforms of the Criminal Justice System (2003) did recommend making the offence compoundable on the ground that maintenance amounts are very low, and should the woman subsequently wish to compromise, she will be unable to do so. We disagree with the reasons, just as we disagree with the approach of Lok Adalats. Compromise is desirable where it furthers the ends of justice, not where it compensates for the limitations of procedural delays, and gaps in legal protection (such as low amounts of maintenance). Notably, the Malimath recommendations did not include a process of consultations with women's groups who are well placed to inform law reform on the subject.

With regard to question 8, the merits of compounding can be noted in instances where the cruelty experienced is not severe, and secondly, with legally recorded acknowledgement of violence and an undertaking to refrain from further violence, with the proviso that a breach of undertaken be taken more seriously. Such compounding is recommended in a case (criteria of what is not severe cruelty must be developed, and not left to the complete discretion of the court), this can only be with the permission of the court. We agree that in the event a formal procedure for conciliation is included, the criteria of what is open to conciliation must be delineated, and a time period set for such conciliation to be effected, failing which criminal prosecution must proceed.

With regard to question 5 – In our opinion the police should not take on the role of conciliators. They are not trained to do so, and in fact, this compromises their role as law enforcers. Trained counsellors or designated NGOs/ social workers may be appointed, however too will require criteria setting so as to clarify the purpose and scope of such an intervention.

With regard to question 6 and 10 – a detailed study needs to be conducted on the experiences women's organisations and individuals who have mediated or sought to conciliate, or

¹DLSA *NyayaKiran* October-December 2008

²Galanter Marc and Krishnan Jayanth 'Bread for the Poor: Access to Justice and the Rights of the Needy in India' *Hastings Law Journal* (Volume 55, No 4) March 2004

experienced reconciliation in 498A cases before recommendations can be given regarding who can act as mediators/conciliators and the role of Legal Service Authorities.

Response to Question 7

Section 498 A and the PWDVA

7. a) Do you think that on receipt of complaint under S.498A, immediate steps should be taken by the Police to facilitate an application being filed before the Judicial Magistrate under the PDV Act so that the Magistrate can set in motion the process of counselling/conciliation, apart from according interim protection?
- b) Should the Police in the meanwhile be left free to arrest the accused without the permission of the Magistrate?
- c) Should the investigation be kept in abeyance till the conciliation process initiated by the Magistrate is completed?

With regard to 7 (a) - section 498A is a penal provision whereas the PDV is a civil law, both very distinct areas of law and cannot be conflated. Further, that 498A is deals with grave cruelty, often life threatening and is the only penal law available. The scope of section 498A is significant given the nature and scale of domestic violence and should not therefore be diluted or merged with the PWDVA.

With regard to 7 (b) – The police should follow the appropriate provisions as stipulated in the Cr.P.C when making any arrest in any cognizable offence, including section 498 A. There is no requirement for the Magistrate’s provision in law and should remain thus.

With regard to 7 (c) – The police should begin investigations immediately after receiving a bona fide complaint under section 498 A case and not wait for a conciliation process to conclude. Often women are forced into conciliation even where clear evidence of grave cruelty exists, and conciliation cannot become a way of postponing state response to a serious offence. It is pertinent to mention that the Magistrate can refer a case for mediation/to the Lok Adalat only once the trial has commenced. A trial commences when investigation concludes with several exceptions and qualifications. Hence the two need not overlap and an investigation must be initiated when an FIR is registered and must be concluded in accordance with the law. Further, it is pertinent to mention that the investigative wing of the State is the role of the executive and the Magistrate exercises a judicial role. Hence there is no necessity to stay an investigation even in cases when the parties have been referred for mediation by a Magistrate. The parties may go through mediation/lok adalat proceedings and if the parties agree then the case can be settled and if not prosecution should continue.

Response to Question 11

Legal Awareness to Women in Rural Areas

11. What measures do you suggest to spread awareness of the protective penal provisions and civil rights available to women in rural areas especially among the poorer sections of people?

PLD is a legal resource group that facilitates assertion of social justice and women’s rights through production of knowledge resources, capacity building and advocacy, in partnership with community groups, many of which provide services to rural women. While we feel knowledge of law is essential to empowering people and changing socio cultural perceptions about women’s roles and status – we have also seen that very often rights violations occur on account of lack of access to the legal system, or obstacles within the legal system/ law

enforcement machinery. Our experience lends us to believe that advancing justice to rural women must include -

- The integration of rights and law in community action and community work, rather than stand alone lessons in legal literacy. We must know the different ways in which law touches the lives of the target group, mobilize target groups through broad community work, integrating law and rights within that.
- To develop feminist perspectives on law, encouraging critical analysis rather than provide prescriptive information on what the law is. To learn about barriers to justice through discussion with rural women and work towards dismantling barriers.
- Work with law enforcement, legal aid and the judiciary on gender sensitization to ensure that barriers to women's access to the system and to justice are reduced, and addressed.

In this regard, PLD has undertaken capacity development of activists, social workers, media persons, and lawyers on gender and law in three states, Jharkhand, Bihar and Orissa – and we have managed to spread awareness on women's rights at the state level. It is expected that this awareness will spread to rural areas by the trainers whom we work with, and who in turn work at the grass root level.

Similar awareness programmes should be adopted rather than lessons on the law, or legal literacy, that is purely informative/ prescriptive. The assumption that knowledge is the only barrier to justice is not correct. Changes with regard to procedure, support systems and services, approaches to counseling and perspectives are necessary to make the system responsive to rural women. Legal Aid Cells could play an effective and proactive role, and connect women to other support services – and help women navigate the civil and criminal procedures. It is necessary that as many persons in the Legal Aid Cells are lawyers with a background in social work and/or human rights and/or feminist studies.

Response to Question 12

Shelter Homes under the PWDVA

12. Do you have any information about the number of and conditions in shelter homes which are required to be set up under PDV Act to help the aggrieved women who after lodging the complaint do not wish to stay at marital home or there is none to look after them?

PLD has not conducted any studies on shelter homes established under the PWDVA. However, we do endorse the need for shelter homes and investigation on conditions within these.

Response to Question 13

Low Conviction Rates under section 498 A

13. What according to you is the main reason for low conviction rate in the prosecutions u/s 498A?

It has been our experience at the field (local) level that only a fraction of women register complaints under section 498 A with the police – and that too as the last resort. Offences reported under section 498A are rarely stand alone offences, but often reported along with 304 B, the offence of dowry death, where burden of proof of causing the death of a bride within 7 years of marriage, is transferred upon the husband and his family members. Section

304B operates after the death of the woman but is contingent upon proof of ‘cruelty’ as defined under section 498A for it to be applied. Failure to prove cruelty as defined under section 498A results in non application of section 304B, leaving prosecution possible only under section 302 IPC that places the whole burden of proof upon the prosecution, which is difficult in cases of crime committed behind the walls of a home, and invariably results in acquittals. This is one reason for low conviction rate under section 498 A; however, a detailed study needs to be conducted on the issue.

Other reasons for low conviction rates could also be shoddy investigation by the investigating agencies due to which the evidence collected becomes inadequate in a Court of law and poor conducted prosecutions by public prosecutors who have a lackadaisical attitude towards these trials.

It is important to note that low conviction rates cannot be cited as proof of misuse of the section. The criminal justice system works at a slow pace, and a conviction rate of 22.4 (NCRB Report, 2008)³ is not unduly surprising.

In any event, conviction rates cannot be the touchstone for whether the enactment of Section 498A is serving its purpose or not. The fact that women have an option of legal recourse when they are in situations of physical and mental cruelty and can resort to exercising these options is a milestone in our social environment. Discrimination against women also includes lack of legal options, both criminal and civil. Hence, it is in keeping with Constitutional principles that Section 498A was enacted and it is important that these laws remain in its present form in order that women who face cruelty within a matrimonial home can exercise legal options which can play a part in their protection.

Response to Question 14 **Crime Against Women Cell and 498 A**

14. (a) Is it desirable to have a Crime Against Women Cell (CWC) in every district to deal exclusively with the crimes such as S.498A? If so, what should be its composition and the qualifications of women police deployed in such a cell?
- (b) As the present experience shows, it is likely that wherever a CWC is set up, there may be substantial number of unfilled vacancies and the personnel may not have undergone the requisite training. In this situation, whether it would be advisable to entrust the investigation etc. to CWC to the exclusion of the jurisdictional Police Station?

We would recommend conducting impact assessment of the performance of the Crimes Against Women Cell (CWC) in areas where they exist before any recommendation to replicate them is taken. If there are findings as to how these obstruct justice, their limitations and recommendations for improvement, these should be factored into any proposal for replication. Since a CWC is manned by police personnel with no training it may be necessary to scrutinize their impact in providing services to aggrieved women. In principle, greater support services to protect women from violence are needed, and such support services, although diverse, must be provided through a single window.

³Figures available at <http://ncrb.nic.in/cii2008/cii-2008/figure%20at%20a%20glance.pdf>