Legal Position of Bigamy in India

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Abstract
"The Offence Of Bigamy Punishable Under Sections 494 And 495 Of The Indian Penal Code, 1860, Materially Differs From The Corresponding Rule Of English Law, Under Which Monogamy Being The Universal Practice, The Rule Is Simpler. But Under Section 494, IPC, 1860 The Criminality Of The Second Or Subsequent Marriage Depends Upon The Practice Of The Caste Or Race To Which The Accused Belongs. If Polygamy Or Polyandry Was Sanctioned By Usage, One Could Not Be Convicted For Doing An Act In Conformity With Custom –Nor Could The Law Enforce Monogamy Upon People With Same Assurance As The Abolition Of Sati Since The One Is By No Means As Serious As The Other."
KEYWORD: *Bigamy, Section 494 IPC, Polygamy, Matrimonial Offence*

INTRODUCTION

"Penal law of India punishes the offence of what is known in English Law as 'Bigamy', but that term is clearly inapplicable to the offence here described for it assumes a second marriage necessarily illegal, but which, having regard to the customs of the people in the orient, is not necessarily the case. The English rule against bigamy is therefore, wholly inapplicable to a non-Christian Asiatic of whatever persuasion. It will however, apply to Christian amongst whom monogamy is rule and bigamy both a sin and a crime." [1] On the face of it, Penal law of bigamy is not discriminatory since it makes no reference to the religion of either spouse. It would be desirable to remove the misconception that no Muslim can ever be punished under the Penal law, and that no Hindu could be punished under the provisions of Penal Code, prior to the Hindu Marriage Act, 1955. A Muslim wife marrying during the subsistence of an earlier marriage can always be punished. "Again a Muslim who marries under the Special Marriage Act, 1954, is liable to punishment for the offence of bigamy, if he marries again during the subsistence of the first marriage."[2]

The social stigma attached with being a second wife, the absence of any legal status to the relationship and the enormous pains of being cheated in to the marriage are undoubtedly extremely depressing for a woman even though there is no recognition given to a second wife, due to the Judicial interpretation of the existing law. Marriage laws other than that of the Muslims now in force in the country prohibit and treat a bigamous marriage as void. "For this reason a marriage to which any of these laws apply attracts the anti-bigamy provisions of the Indian Penal Code which are applicable to a bigamous marriage if it is void under the governing law for the reason of being bigamous."[3]

"For a long time past, married men whose personal law does not allow bigamy have been resorting to the unhealthy and immoral practice of converting to Islam for the sake of contracting a second bigamous marriage under a belief that such conversion enables them to marry again without getting their first

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[1]Gours, H.S. (Dr.),*"Offences Relating to Marriage and Punishments in India"*, 5th edition, 1977
[2] Gours, H.S. (Dr.),*"Penal Law of India"*, 4605, Vol. IV, 11th Edition, 2009.
[3] Section 494-495, Indian Penal Code, 1860.

marriage dissolved. The Supreme Court of India outlawed this practice by its decision in the landmark case of ***Sarla Mudgal v. Union of India"***.[4] "The ruling was re-affirmed five years later in ***Lily Thomas v. Union of India".***[5] Though these cases related to marriages governed by the Hindu Marriage Act, 1955, their *ratio decidendi* would obviously apply to all marriages whose governing laws do not permit bigamy.

The Supreme Court decision on this subject is now the law of the land, and yet it is being widely violated across the country. Two conspicuous cases of unlawful bigamy through the route of conversion to Islam were reported and made headlines in the year of 2009. In one of these cases "a prominent politician, already a husband and a father, mysteriously disappeared and surfaced a month later with new bride claiming that they had become husband and wife under the law of Islam to which both of them had since converted. The fact that the new bride in this case, who was a lawyer and had been a law officer with the government of her State, kept on the publicity claiming that her marriage to the convert-bigamist was fully-legal due to his conversion to Islam clearly showing the ignorance about the law settled in this respect by the Apex court prevailed also in the community of lawyers."[6] In the second case another married man, "an army physician of India serving in Afghanistan, converted to Islam in order to marry an Afghan Muslim girl serving him as an interpreter. The poor girl was kept in the dark about his marital antecedents and discovered the same only when years later he returned to India leaving her behind in Afghanistan."[7] These are, of course, not the only prominent instances where married non-Muslims men claiming to have converted to Islam have duped their first wives; many of such cases even go unnoticed. There is, thus, a need to make the legal position as settled by the Supreme Court clear enough by introducing necessary provisions to that effect in all the existing legislative enactments governing marriages among various communities.

The undertaken work examines the existing legal position of bigamy in India and suggests ways to check the social malaise of bigamy through the route of sham conversion.

HISTORICAL PERSPECTIVE IN INDIA:

"Though monogamy is the rule from *Vedic* times, polygamy has, an exception, existed side by side. But the wife who was wedded first was alone the wife in the fullest sense. One text of Manu seems to indicate that there was a time when a second marriage was allowed to a man after the death of his former wife. Another set of text justifies a husband taking another wife. It was only when a wife was barred or vicious that she could be superseded and a second marriage was valid; as also when she consented."[8]

As a norm, the first wife had precedence over the others and her first-born son over his half-brothers. It is probable that originally, the subsequent wives were considered as merely a superior class of concubines. "Later, in the courts of British India, it was settled law that a Hindu male could without any restriction marry again while his previous marriage subsisted without his wife's consent and justification."[9] "Customs, however, did prevent the second marriage without the consent of the first wife and without

[4] AIR 1995 SC 1531.
[5] (2002) 6 SCC 224.
[6] Singh, Deepali, "Bigamy, Conversion and Women's Right in India", *Rewire News* Oct 5, 2009: *Google News* Web. 12-Feb-2019.
[7] A. Divya, "Bigamy: An issue of one too many" *The Times of India* Sept 13, 2009: *Google News* Web. 12-Feb-2019.
[8] Chakraborti, Haripada, *"Hindu Intercaste Marriage in India: Ancient and Modern,"* Sharada Publishing House, 1999.
[9] *Ibid.*

making provisions for her. A custom prevalent amongst Nadars in Udumalapeta Taluk preventing second marriage, even if established could not have the force of law."[10]

SCOPE AND APPLICABILITY OF SECTION 494

The law treats bigamy as an offence in order to ensure conjugal happiness among those who belong to monogamous communities. Thus, an offence under section 494, Indian Penal Code, 1860, could only be committed by persons whose previous marriage operated as a bar to another. So, for all practical purposes, this section when enacted, applied only to Christians. Subsequent legislation, however, has altered the position. "The Special Marriage Act, 1954, and marriages solemnized under that Act are subject to the provisions of this section. The Hindu Marriage Act, 1955 makes monogamy the rule for all Hindus, Buddhists, Jains and Sikhs and the provisions of this section will consequently apply to their marriages also." [11] "The provisions of Section 494 is attracted when a person marries after the commencement of the Hindu Marriage Act, 1955, when he a wife living."[12] To sum up, this section now applies to all the communities in India except the Muslims.

"It will be noticed that section 494, makes no reference to intention, knowledge, fraud or deceit, but constitute the mere contracting of second marriage a crime."[13] It is then impossible that a person may offend against the rule without being fully conscious of it. "But the rule is enacted in the interest of the peace of society and the *mens rea* is furnished by the knowledge of the voidability of the ssecond marriage necessarily implied in one who contracts it, which might at first appear conflicting and contradictory. Of course, this is the very essence of the crime, for if the second marriage is not void, criminal law cannot punish what the civil law does not prevent to."[14]

The voidability of the second marriage depends upon the validity of the first marriage, and upon the fact that the second marriage was a valid and sufficient marriage, but for the existence of the first marriage. The validity of a marriage depends upon –

- The religion of the parties
- Their domicile
- The performance of ceremonies constituting the marriage

"In case of ***Krishna Kanta Nag v State of Tripura***,[15] wife gives complaint under section 494, IPC that her husband contracted second marriage during her lifetime. The parties professed Hindu religion. Wife could not prove that second marriage was performed in accordance with Hindu rites and ceremonies there was thus, no valid marriage. So, husband not guilty of offence under Section 494 and the conviction was set aside."[16]

Section 494 does not apply to Muslim males, who are allowed to marry more than one wife. But by Section 17 of the Hindu Marriage Act, 1955, Section 494, applies to Hindus. "The combined effect of Section 17 of HMA and Section 494, IPC is that when a person contracts a second marriage after the

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[10] "*Offence of Bigamy under Indian Penal Code, 1860"*< http://shodhganga.inflibnet.ac.in/jspui/bitstream/10603/201840/7/07_chapter%202.pdf > accessed on 13th Feb, 2019.

[11] *OFFENCE OF BIGAMY UNDER INDIAN PENAL CODE, 1860* < http://shodhganga.inflibnet.ac.in/jspui/bitstream/10603/201840/7/07_chapter%202.pdf > accessed on 27th FEB,2019

[12] *Rabindra Nath Dutta v,. State*, AIR 1969, Cal 55 at 56.

[13] Ratanlal Ranchhoddas. Ratanlal & Dhirajlal*, "The Indian Penal Code (Act XLV of 1860)" New Delhi :Wadhwa & Co., 2007.*

[14] *Pits* v. *State,* 95 AC. 706.

[15] 2013(5) RCR (Criminal) 338 (Gauhati) (Agartala).

[16] Ibid

coming into force of the Hindu Marriage Act, 1955, while the first marriage is subsisting, he commits the offence of bigamy."[17] "Section 494 applies to Muslim females and to Christians[18] and Parsis[19] of the either sex."

NATURE OF OFFENCE

"The offence under Section 494 of the Indian Penal Code is non-cognizable, bailable and compoundable by the aggrieved spouse with the permission of the court. That the offence is compoundable by mutual consent of the parties was affirmed in ***Narotam Singh v State of Punjab***.*"*[20]
"In the State of Andhra Pradesh, however, by a local amendment of 1992 the offence under Section 494 was made cognizable, non-bailable and non-compoundable"[21] The offence under Section 495 of the Penal Code is non-cognizable, bailable and – unlike that under Section 494 -- non compoundable. Notably, in Andhra Pradesh this offence too has been made cognizable and non-bailable.

IPC PROVISIONS IN ACTIONS

"Bigamy by women is very exceptional in the society, but bigamy by men is indeed rampant. However, since the anti-bigamy provisions of the Indian Penal Code are (except in Andhra Pradesh) non-cognizable most cases of the offence of bigamy remain unpunished. The aggrieved first wives of all communities silently suffer the miseries caused by the practice of bigamy."[22]

There is also a trend in the society to use devices, supposed to be 'legal', to escape application of the IPC provisions. Among these are holding incomplete and defective marriage ceremonies, non-marital cohabitation and fake change of religion.
With the sole exception of Andhra Pradesh, nowhere have any changes in the IPC provisions or the related procedural law been yet considered in order to improve upon the working of the said provisions.

INTERNATIONAL PERSPECTIVE

Certain commitments under the international human rights law makes it obligatory for the member nations to respect freedom of religion as well as guarantee equality between men and women. "Although polygamy, as practiced in various nations across the globe, engages freedom of religion arguments, it is important to note the distinction between religious belief and religious practice. While a few countries are not entitled under the international law to restrict religious belief, they are entitled and in fact obliged in some circumstances to restrict religious practices that undermine the rights and freedom of others. Various courts have that the right to manifest one's religion can be limited for legitimate purposes including the protection of health, the promotion of secularism and the protection of gender equality."[23]
"Amidst this international and domestic law commitment to gender equality, this chapter will outline how the practice of polygamy violated women's right to equality within marriage and the family, amongst other rights, using the source of international law identified in Article 38 of the Statue of International Court of Justice"[24] as a guiding framework:

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[17] *Gopal Lal* v. *State of Rajasthan* AIR 1979 SC 713
[18] Indian Christian Marriage Act, 1872.
[19] Parsi Marriage and Divorce Act, 1936
[20] AIR 1978 Sc1542
[21] Mavri Rani Veerabhadramma v. State of AP
[22] Supra Note 15
[23] Niamh Reilly, *Women's Human Rights,* (Polity Press, UK, 2009)

[24] S.R. Chauhan and N.S. Chauhan, *International Dimension of the Human Rights* (Global Vision Publishing House, New Delhi, 2012)

Art. 38.1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply –

a) "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b) international custom, as evidence of a general practice accepted as law;
c) the general principles of law recognized by civilized nations;
d) Subject to the provisions of Article 5, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."[25]

Under international human rights law, there is a growing consensus that polygamy violates women's right to be free from all forms of discrimination. "Where polygamy is permitted through religious or customary legal norms, it often relies on obedience, modesty, and chastity codes that preclude women from operating as full citizens and enjoying their civil and political rights. Within this framework, women can often be socialized into subservient roles that inhibit their full participation in family and public life. The physical, mental, sexual and reproductive, economic, and citizenship harms associated with the practice violate many of the fundamental human rights recognized in international law."[26] State practice indicates that a complete legal prohibition of polygamy is the norm in most domestic systems including all of the Americas, Europe, and countries of the former Soviet Union, Nepal, Vietnam, China, Turkey, Tunisia, and Côte d'Ivoire, amongst others. In addition, there is a marked trend toward restricting the practice elsewhere, particularly through judicial and/or spousal permission requirements. "These restrictions reflect not only the socio-economic problems associated with polygamy, but also a growing recognition of women's right to equality."[27]

"The right to gender equality has been central to the evolution of post-World War II international human rights law. Initially, human rights declarations and conventions adopted a negative sense of gender equality by deeming sex a prohibited ground of discrimination."[28] "The 1948 Universal Declaration of Human Rights (Universal Declaration), the International Covenant on Civil and Political Rights (the Political Covenant), and the International Covenant on Economic, Social and Cultural Rights (the Economic Covenant), all relied on the norm of sex non-discrimination. Within this non-discrimination framework, there are variations that may import positive obligations on States parties. Article 23(4) of the Political Covenant, for example, requires States parties to "take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage, and at its dissolution." The term "ensure" is typically interpreted within the treaty context as imposing a positive duty on States parties to achieve the stated goal."[29]

THE RIGHT TO MARRIAGE

UDHR states the right to marriage in its Article 16 acknowledging that men and women are equal before the law in marriage. Furthermore, marriage is mentioned in ICESCR[30] and ICCPR[31] but as a right only in ICCP which states that –

"The right of men and women of marriageable age to marry and to found a family shall be recognized".[32]

[25] Article 38, International Court of Justice
[26] Chiranjivi J. Nirmal, *Human Rights in India* (Oxford University Press, New Delhi, 2000)
[27] *Ibid*.
[28] U.C. Jha, *Human Rights and Justice* (Vij Books India Pvt Ltd, New Delhi, 2010).
[29] Supra Note 90.
[30] Article 10.
[31] Article 23.
[32] *Ibid*.

The two articles from the two conventions both stress that free and full consent are required for entering a marriage and that the family is the natural and fundamental unit of society. "CEDAW also contains an article regarding marriages."[33] It stresses that men and women have equal rights in marriage, especially in relation to the right of getting married, free choice of spouse, free and full consent, equal rights and obligations and more.

Although all four human rights instruments mention marriage as a human right and equal right none of them mentions anything specifically about marriage being a monogamous union, or who and how many people can get married to. It is hereby unclear if the Declaration and the Conventions are open towards polygamous marriages or not.

CONCLUSION AND RECOMMENDATIONS

All said and done, the Supreme Court of India settled the law once and for all in its *Sarla Mudgal* ruling of 1995 and affirmed in *Lily Thomas* case of 2000. The Law Commission in its 227th Report has agreed with the thinking of the apex court. The verdict that married non-Muslim even on embracing Islam cannot contract another marriage without first getting his first marriage dissolved is undoubtedly in conformity with the letter and spirit of Islamic law on bigamy.

In any case, this is now the inviolable law of India – whatever one may erroneously presume the Islamic law to be. Unfortunately this law is settled by the Supreme Court is now widely known to the public at large and is being constantly violated in numerous cases. The need of the hour, therefore, is to turn the apex court's ruling into a clear legislative provision inserted into all matrimonial-law statutes of the country. Though these rulings were handed down in the context of the Hindu Marriage Act 1955 they will apply to all marriages governed by the other family-law statutes that are *pari materia*.

Certain Recommendations given by the Law Commission in its 227th Report – On careful consideration of all aspects of the trend prevailing among married non-Muslims to try defying the law by marrying again on embracing Islam, the law commission recommended insertion of the following additional provisions into various family-law statutes -

In the Hindu Marriage Act 1955, after Section 17 a new Section 17-A be inserted to the effect that a married person whose marriage is governed by this Act cannot marry again even after changing religion unless the first marriage is dissolved or declared null and void in accordance with law, and if such a marriage is contracted it will be null and void and shall attract application of Sections 494-495 of the Indian Penal Code 1860.

The offences relating to bigamy under Sections 494-495 of the Indian Penal Code 1860 are made cognizable by necessary amendment in the Code of Criminal Procedure 1973.

"The offence of bigamy punishable under Sections 494 and 495 of the Indian Penal Code, 1860, materially differs from the corresponding rule of English Law, under which monogamy being the universal practice, the rule is simpler. But under Section 494, IPC, 1860 the criminality of the second or subsequent marriage depends upon the practice of the caste or race to which the accused belongs. If polygamy or polyandry was sanctioned by usage, one could not be convicted for doing an act in conformity with custom –nor could the law enforce monogamy upon people with same assurance as the abolition of *Sati* since the one is by no means as serious as the other."[34]

From the days when a Hindu could marry as many wives as he would like to and a Muslim can even now marry at a time four wives, the society in recognition of the respectable position of the women has reached a stage where monogamy is the order of the day. Polygamy is statutorily barred in the case of Hindus and a recent decision of the Supreme Court would make it economically impossible for a Muslim to marry more than one wife. Equality of sex or eschewing sex discrimination needs tightening up of law which prohibits second marriage in the life time of the first spouse. "There is a lacuna in Section 494, Indian Penal Code, 1860, which prohibits bigamy. Whenever a man is charged for having contracted a

[33] Article 16, CEDAW, 1967.
[34] *Supra* Note 138.

second marriage within the life time of the first wife, the defence is that his first marriage was void. In fact, once the first marriage is consummated, the defence that first marriage was void must be statutorily barred. To do gender justice, this is the next inevitable step."[35]

Bigamy is a serious offence and no leniency should be shown. However, while awarding sentence, the court may take into account facts and circumstances of the case, such as, fact "of irretrievable break down of first marriage;"[36] "fact of birth of a child by second wife"[37], "long lapse of time between the marriage and final disposal of the case"[38]; "the fact that the accused is merely an abettor,"[39] etc.

"Where a woman who has been left largely to her fate by her husband and has been living in adultery with a paramour, marries that paramour, she is guilty only of a technical offence and deserve only nominal punishment."[40] "Where the accused as a young peasant and his first marriage was in disarray irreparably and he married a second time because of the natural need of a comrade – at hand as also to help him pursue his vocation of agriculture, the sentence of nine months imprisonment was reduced to twenty-nine days imprisonment already undergone but the sentence of fine was increased from Rs. 200 to Rs. 2,000."[41] "Where the accused was found guilty under Section 494, but he was only a first offender and there was nothing on record against his character and antecedents and had also lost his job, the court thought it proper to release him on probation under Section 4(1), probation of offenders Act, 1958."[42]

Where the accused was only twenty-two years of age and had been found guilty for the offence under Section 494, but the accused had appeared in the court and made a statement that he was prepared to keep the complainant with him as his wife, the second wife would not live with him and had also undertaken not to do in future any act which might injure the relations between him and his wife or which might amount to an offence under law, it was held that it was a fit case in which the accused be given an opportunity to become a better citizen and should be released on probation for a period of one year after entering into a bond with two sureties in the sum of Rs. 1,000 each. The High Court observed : 'The rationale of the offence under Section 494 is to deter a spouse from breaking the home by taking another spouse. Second marriage, where it is prohibited by law, in effect amounts to disowning the first marriage. If the accused is sent to jail the wrong will not be remedied and the gap between the husband and wife will get still more enlarged and will become unbridgeable. On the other hand, if they live together, the wrong done to the wife will get undone and the effect of the crime will be nullified"[43]

In Sarla Mudgal and Lilly Thomas the court expressed its distress over the Governments failure in enacting a uniform civil code to end discrimination among various religious communities in the areas of marriage, succession and property and observed that such a code would help in removing contradictions based on religious ideologies and such matters of secular characters can not be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution of India.

The court rightly said that 'the period of 12 months could not have been linked to the object of performing the philanthropic act. It is high time a uniform civil code be enacted at the earliest. The law makers should rise above party politics and fulfill the constitutional mandate given by the framers of the constitution by enacting a uniform civil code." Even small countries like Singapore and Hong Kong have enacted uniform law where persons belonging to different religious faith are living."[44]

In any case, this is now the inviolable law of India… whatever one may erroneously presume the Islamic law to be. Unfortunately this law as settled by the Supreme Court is now widely known to the public at large and is being constantly violated in numerous cases. The need of the hour, therefore, is to turn to

[35] *Ibid*.
[36] *Narotam,* AIR 1978 SC 1542.
[37] *Ashok Hurra v. Rupa Ashok Hurra*, (1997) 4 SCC 226.
[38] *Ananda* (1993) Supp 3 SCC 68.
[39] *Ibid*.
[40] *Ritha*, AIR 1926 Nag 127.
[41] *Darshan Singh*, 1982 HLR 4 (P&H).
[42] *Didar Singh* (1983) 2 Crimes 144 (P&H).
[43] *Sindhiya Devi* 1974 CriLJ 1403.
[44] *Supra* Note 138.

apex court's ruling in to a clear legislative provision inserted into all matrimonial law statutes of the country. Though these rulings were handed down in the context of the Hindu Marriage Act, 1955, they will apply to all marriages governed by the other family – law statutes that are *Pari materia.*

Therefore, the offence of bigamy should be made cognizable offence and the recommendation of Malimath committee on reforms of criminal justice system should be adopted by making a suitable amendment in Section 494 and 495, Indian Penal Code, 1860 and in the Code of Criminal Procedure, 1973, it would certainly curb the offence of bigamy. Despite the fact that the progressive groups both within and outside Muslim society in India they do not favour bigamy, religious leaders continue to block legislative reform.

In the context of the social menace of polygamy the present Indian law is awfully defective. Many legal challenges are required in this law. If bigamy means two women cohabiting with the same men as his wives, it is surely an archaic practice and must be stopped by law. But if bigamy means remarriage of a married man after separation from his first wife with whom his first marriage has in fact irretrievably broken down, mere passing of law cannot stop it. To put an end to such a practice what is required, is an overall reform and a thorough overhauling of the entire system of our matrimonial laws – both substantive and procedural. The number of cases in which a man may actually be cohabiting with two or more wives is indeed microscopic. Married men, of course, marry again – but they do so when their first marriage, although still existing in the name, has in fact broken down. And this malady cannot be cured either by declaring bigamy to be an offence or by simply providing under the family laws that a bigamous marriage would be void.

An effective enforcement of the socio-legal ideal of monogamy in India requires, as the first step, a proper reform of section 494 and 495 of IPC as also laws of divorce applicable to various communities in India. Certain reforms suggested are: *First*, these sections should be amended to provide that a bigamous marriage will attract their provisions if it has taken place in violation of the matrimonial laws applicable although it may not be void under that law and even if not properly solemnized or contracted as required by that law. *Secondly*, the exceptions in section 494, IPC should be deleted as they are superfluous and are already covered by the marriage laws applicable in various cases. *Thirdly*, on the lines of section 12 of the Child Marriage Restraint Act, 2929, an appropriate provision should be made empowering courts to issue an injunction prohibiting an intended bigamous marriage if it violates requirements of the law applicable to the case. *Fourthly*, offences under these sections may be made cognizable, non-compoundable and non-bailable. *Fifthly*, the Family Courts Act, 2984 should immediately be implemented throughout the country and family courts having civil and criminal proceedings involving bigamy, both civil and criminal, should be vested in these courts. *Sixthly*, convenient and quick procedure for disposal of all matrimonial cases – civil and criminal, ignoring the niceties and rigidities of the rules of civil and criminal procedures followed in other courts, and focusing on reconciliatory methods – should be detailed in the Family Cou