The second part of the envisaged Children Code would deal with the integrated set-up of judiciary, the structure and functioning of which is truly child-oriented.

Merely defining the rights of the child or the duties of the parents or the responsibilities of the state is no insurance of the child's material and moral security and his true welfare. Existence of an appropriate judicial and administrative infrastructure to assure that the child is enjoying his rights and the parents, the society and the State are performing their respective obligations is as much a part of an integrated approach to child protection as the substantive law. An important measure in this direction is indicated to be adopted in the National Policy for Children thus:

existing laws should be amended so that in all legal disputes, whether between parents or institutions, the interests of children are given paramount consideration (1).

The structure of the judicial forum, the procedure adopted there at and the environment of its functioning have a direct bearing to the considerations of the best interests of the child. Administration of justice civil or criminal, does not so much depend upon the educational qualifications of the judge who is always at least a law graduate or if a Magistrate, who is invariably a graduate, as upon his child-orientation. The welfare of the child can not always be decided on the basis of assertions and contentions, formal proofs and disproofs, or in terms of the success or failure of the civil or criminal procedures. It requires a different perspective through a distinctive mode of functioning of the whole machinery involved in the judicial process. The approach here should be therapeutic than adversary and the welfare of the child should be judged from the child's

1. Policy and Measures 3(xiv).
perspective and not that of the guardian's and he should be separately represented.

A Court engaged in the task of providing justice to the child requires a less formal and more effective investigational and inquisitional procedure\(^2\) which would require the assistance of specialised persons and agencies. Thus, such a procedure would imply not a litigation in which parties and their counsels are engaged in winning or defeating legal action. In this type of procedure, lawyers, child social workers, welfare officers, psychiatrists all together join and assist the court\(^3\).

(A) **INEFFICACY OF EXISTING JUVENILE JUSTICE**

**Question:** Does the existing judicial set up confirm to the needs of a proper juvenile justice?

The review of the structure and functioning of the civil courts, criminal courts, children courts and welfare boards made by us\(\text{see Chapter VIII of this work}\) leads to the conclusion that no doubt an attempt has been made to establish separate juvenile courts for the delinquent children and the neglected children and the procedure adopted thereat is different in some respects from the ordinary criminal courts, but no attempt has so far been made to provide a separate forum or a distinctive procedure to hear the civil matters involving children. The amendments recently made\(^4\) under the Code of Civil Procedure, whereby a new order XXXII-A has been added providing some special procedural safeguards while hearing matters relating to family, including children's causes, hardly meet the needs of the children.

The District courts and other subordinate courts exercising civil jurisdiction over children are so busy in their routine business of deciding all types of civil and criminal matters that they can hardly consider the best interest of the child. But the judges are not to be blamed for it. The judge is neither required

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3. Ibid.

to have some special qualification, nor provided with any special training in children jurisprudence and juvenile justice and is not aided by any auxiliary services. It is a fault of the system. The routine litigation specially on the civil side is marked by inordinate delays, burdensome expenses and physical and mental tensions involved in the long wait outside the court room, and the intricate procedural and evidentiary formalities inside. After an amendment made in 1976, under certain matrimonial enactments, the courts are now directed to hear the matrimonial cases day to day and dispose them early. But a similar direction is missing under order XXXII-A in respect of the other matters concerning the child.

The children not being parties to either guardianship or custody proceeding or the matrimonial or adoption proceedings, are not represented before the courts by an independent lawyer or welfare agency. The Court has no access to an impartial information regarding the real circumstances of the child to decide his true welfare. More often than not children get caught up in inter spousal matrimonial conflicts and guardianship disputes between two adversaries.

The powers of the existing civil courts administering justice to children are limited. Their discretion extends to appoint a guardian or remove him, give or refuse to give custody of the child to the claimant of it, allow or dis-allow transfers of property by the guardian, and impose conditions to regulate the conduct of the guardian. They have certain amount of discretion in passing the maintenance orders and a limited jurisdiction in respect of certain Hindu Children who are sought to be given in adoption by a guardian other than their natural guardian. Our civil courts do not enjoy many of the powers conferred upon civil courts under certain advanced legal systems so that civil juvenile justice remains imperfect.

Under the advanced legal systems the courts whether exercising jurisdiction over children in civil matters or in criminal

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5. e.g. Sec.21B Hindu Marriage Act, 1955 inserted by the Marriage Law (Amendment) Act, 1976.
7. Section 9(4), Hindu Adoptions and Maintenance Act, 1956.
matters are equally empowered to order certain measures ensuring care of the child, in all unprovided eventualities and provide him protection against all kinds of material and moral dangers. For instance, the English law follows the basic principle stated under section, 44(1) of the Children and Young Persons Act, 1933 as follows:

Every court in dealing with a child or young person who is brought before it shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training.

To meet these ends all courts are now provided with powers to pass 'Care orders', 'Supervision orders' and 'Wardship orders' in respect of any child who is found in need of it. Under 'care orders' the civil courts may commit any deprived child to the care and protection of the local authority, which then provides full fledged institutional care to such child including his maintenance and health requirements and his education and training. Under a 'supervision order' the child remains in the 'care and control' of his parents or guardian but subject to the supervision provided either by the local authority or the child welfare officer, who keeps a watch on the conduct of the guardian or custodian. In 'Wardship orders' though the child remains in the guardianship or care and control of his parent, guardian or custodian, but the sum of parental rights and powers, vests in the court. The parent or guardian then acts as an agent of the court, seeking the courts advice wherever a question of discretion arises. A Wardship order may be supplemented by a 'supervision order' and also a 'care order'.

The French law requires a supervisor called Subroge Tuteur, to be appointed by the courts, wherever a guardian called tutor is appointed by it. The function of the Subroge tuteur is to keep a watch on the proper discharge of his duties by the tutor and report the matter to the court whenever there is a

8. As amended by subsequent Acts.
10. Ibid.
failure in the discharge of those duties.\textsuperscript{11}

The Dutch law provides similar child care measures under the civil law and the court can place the child under supervision, take the child into care or order him to be removed from his home. A supervision order can be ordered, if a child is threatened with moral or physical danger. Under that law the parents who are unable or unfit to carry out their parental duties properly, may be ordered to be released or removed of their parental rights. Their guardianship then vests in the guardianship society which decides whether the children will be brought up in a foster family, or in a children's home.\textsuperscript{12} A District court may also place a child in the care of Child Care and Protection Board, provisionally in all cases of emergency, pending the conclusions of proceedings relating to the deprivation of parental authority or guardianship or concerning divorce or legal separation.\textsuperscript{13}

The system of separate juvenile courts with a distinct procedure based on juvenile philosophy of treatment, training and reform was inaugurated in India with the passing of the Madras Children Act, 1920, as a result of the recommendations of the Jails Committee. The jurisdiction of the juvenile courts extended over two categories of children viz. the delinquent children and the children in need of care and protection. Though in theory the system has been adopted by almost all the states and union territories under the Children Acts, governing them, yet in practice in many parts of the country, no separate juvenile courts having been established such children are being dealt with by the common criminal courts. The welfare boards which were created twenty fours ago to deal with the neglected children, separately from the delinquent children, under the Children Acts, 1960, are still on the book. Only one Board each exists in Delhi and Punjab and a few in Rajasthan. Then there are structural and functional variations in the set up of the juvenile courts under the different state Children Acts.

\textsuperscript{11} Amos and Walton's INTRODUCTION TO FRENCH LAW (3rd edn.) 1969, Oxford, P. 81-84; see also Arts 396-475 Civil Code.

\textsuperscript{12} Dr. M. Rood-De Boer, Child Care in the Netherlands, (1971), National Federation for Child Welfare, the Hague, pp.3-9.

Thus while the civil justice has no child orientation. The criminal justice though partially juvenile-oriented due to many anomalies and deficiencies, is inefficient in providing the needed care and protection to the children.

To translate the pledge of serving the best interests of the child and to keep his welfare as a paramount consideration during judicial proceedings, the structural setup of the existing courts shall have to be reformed. Some more powers have to be conferred on the courts, the procedure at the hearing shall have to be simplified and the atmosphere of functioning shall have to be rationalised.

(B) REFORMATION OF JUDICIAL STRUCTURE AND ITS FUNCTIONING RECHILDREN

More than one alternatives are available for the reform of the present judicial set-up in the context of the justice to the child. Different legal systems have evolved their own set-ups to solve similar problems of juvenile justice but no single system has yet been proclaimed to be the best. To devise a proper scheme of reforming the present Indian judicial set up from the child's perspective, it becomes relevant to have a look upon certain foreign models of judicial set up exercising jurisdiction over children.

(a) Certain Models of Reform

(i) England: At the English legal system, from which the Indian systems has derived its present structure, there is a similar fragmentation of jurisdictions. Broadly, there the family law matters are decided by the civil courts while the juvenile courts deal with the juvenile delinquents and also exercise care jurisdiction over children. Like ours the juvenile court is merely a special kind of Magistrate's court, whose object is to provide a separate tribunal for children and young persons. But the civil courts as we have pointed out above, are provided with efficient support services including welfare officers and local authorities and are also conferred with quite extensive powers to provide care

and protection to children under all possible contingencies, by passing 'care orders', 'supervision orders', 'wardship orders', and 'custodianship orders', foreign to the Indian jurisprudence. Thus in spite of a diversification of jurisdictions, the system is quite alert to protect the child.

The proposal for setting up separate family courts to hear all family matters put up before the Royal Commission was curtly rejected on the ground that it would result in an increased burden on state exchequer. The High Courts, however, have a separate Family Division under the Administration and Justice Act, 1970 which exercise both original and appellate jurisdictions on family law matters including children. In fact, at that law the High Court originally exercised an exclusive matrimonial jurisdiction which was gradually transferred to County and Magisterial courts.

(ii) United States of America: In the United States of America around early 1960s there was a strong public opinion for constitution of a single court in each locality absorbing not only all the present jurisdictions of the juvenile court but also embracing divorce and other matrimonial causes with their attendant children's custodial problems and to also receive complaints of neglect of women and children, cruelty to the child, adoption and guardianship. A number of cities in Ohio and Oregon, have had such integrated family courts on an experimental basis, and in the testimony of outstanding authorities found it a successful method.

In Toledo in Ohio, the Court of Common Pleas of Lucas County Division of Domestic Relations has a comprehensive jurisdiction in family and juvenile matters. It has expert services attached to it giving full scope for therapeutic idealism with a staff of over 100 persons comprising Probation officers, Marriage Counsellors, Psychologists, Psychiatrists and Paediatricians.

16. See First Schedule to the Act, for jurisdiction of the Court.
There is a statutory requirement for full investigation of family background even in divorce proceedings, involving children under fourteen years of age.\(^\text{18}\)

In the city of New York cases arising out of the Children's neglect and delinquency are handled by the Children's Court, which is a branch of the Domestic Relations Courts. Support claims are heard by the family court, unless they arise in connection with matrimonial proceedings which are under the jurisdiction of the Supreme Court. The latter also adjudicates disputes concerning custody of children, if incidental to a matrimonial action or if presented by a habeas corpus proceeding. But outside such proceedings, these disputes are handled by the Domestic Relations Court, which is another name for a Family Court.\(^\text{19}\)

The advantages claimed for the said set up in the U.S.A. are that there is an elimination of frequent and wasteful conflict of jurisdiction, as found in the existing set up where two or more courts claim cognizance of the same family problems and its therapeutic approach, whereby it would diagnose and cure the underlying causes of family disorder. Wherever such care is not possible it would perform its legal operation with the least injury to the person involved an approach long applied by successful juvenile courts. The cost of set-up of such court and its maintenance is less, with the possibilities of maintenance of complete records of a given family. Furthermore, as a specialised court the sensitive handling of intimate human relationship and juvenile psychology would be a feasibility.\(^\text{20}\)

(iii) New Zealand: Influenced by the Domestic Courts of Los-Angeles and Toledo, the New Zealand's Domestic Procedural Act which has reconstructed the whole law governing domestic proceedings has set up Domestic Courts. The Domestic Courts are vested


with powers to call for reports from a child Welfare Officer and to appoint solicitor or counsel to assist the court in the exercise of any of its powers. The process of conciliation is the core of the enactment. The Act also contains important provisions designed to improve the lot of the mother of the illegitimate child.

(iv) **Canada** : In Canada, the Ontorio Law Reform Commission, 1974 in Part V of its report on Family Law, recommended that the fragmentation of jurisdiction to deal with child guardianship, maintenance and other cases relating to family matters should be eliminated by the establishment of unified family court, structured with integrated and comprehensive jurisdiction to deal with family matters, including matrimonial remedies, declaration of status of a child, maintenance, access and upbringing of children, adoptions, guardianship and child neglect.

(v) **Australia** : The Family Court of Australia, established under the Family Law Act, 1975 aims to be a 'helping court'. It has jurisdiction in relation to only family matters including children. Its features are that an application can be made to the Family Court for custody and maintenance of children even if a divorce is not sought. A Principal Director of Court Counselling and staff of Court Counsellors, are attached to the court to help parties to a marriage to settle their problems. The Family court has the important task of protecting and promoting the welfare and rights of children in proceedings regarding their guardianship and custody. The child may be separately represented. A matrimonial decree does not become effective unless the court is satisfied that proper arrangements have been made by parties for the welfare of their children. In the absence of a court order, both the parties to a marriage have joint-custody of a child as a matter of law. Similarly both parties are liable to maintain their children.

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according to their respective means. 23.

The Family Law Act provides for legal assistance to be given by the Australian Legal Aid Office to persons who are assessed to be unable to afford representation including the children. The court has pamphlets printed in Arabic, Finish, German, Italian, Serbo-Croat, Spanish and Turkish to explain the operations of the new family law.

The Judges of the Family Court are chosen because of their suitability to deal with matters of family by reason of their training, experience and personality. A person who has been judge of another court or has been involved as legal practitioner for not less than five years can become a judge of the Family court. The Family court is a full court when there are three or more Judges on the Bench. They do not wear Wigs and gown, the staff attached to the court include trained counsellors and legally qualified Registrars and Deputy Registrars. In dealing with proceedings under the Family Law Act, the Family court is required to have regard to the need etc. give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children, the need to protect the rights of children and to promote their welfare, and the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to the children of the marriage. 24.

(vi) Japan: The Family courts system of Japan is a unique example of integration of the juvenile courts and the Family courts and provides another model worth consideration. It is a court in which the principles of law, the conscience of the community, and the social sciences particularly those dealing with human behaviour and personal relationship work together. 25. Since the adjustment of the families situation is an absolute pre-requisite for the

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24. Ibid.

25. In Japan the Family court is called as Katei Saibansho; See, the JAPANESE LEGAL SYSTEM Ed. Hideo Taneka (1976) University of Tokyo Press, p.50.
protection of children and the prevention of delinquency, both family and juvenile problems have been placed under the jurisdiction of a single tribunal.

The functions of the court are to deal, within the scope defined by law, with actual problems of the family and delinquent juveniles. Using the case work method, it attempts to diagnose the cause of a particular trouble and to prescribe a reasonable remedy. The procedure of the family court is informal and readily adjustable to the circumstances of the persons before it, while its hearings are kept in privacy and therefore generally protected from publicity. The court not only seeks to determine and secure the legal rights of individuals before it, but it also is charged with a supervisory role for the protection of the welfare of juveniles and families.

The family court of Japan is independent from but equivalent to, in its status to the District Judge. There is one court in each prefecture. The full judges of the court must possess at least ten years experience as a judge or a lawyer. The remaining judges are associate judges and may be young but all judges must possess a sufficient enthusiasm, ability and understanding to deal with family and juvenile cases. In average there are three to four family court Probation Officers assigned to one judge. Each family court is equipped with a clinic and medical officers. Then there are Family Court Counsellors, and Conciliation Commissioners.

The Family court has two separate divisions viz. The Juvenile Division and the Family Affairs Division. The jurisdiction of the Juvenile Division of the Family court extends to (a) delinquent juveniles under 20 years of age and (b) adults who have in some way brought about an injury to the welfare of juveniles.

26. The Juvenile Law and the Law for Determination of Family Affairs were modified to provide for the creation of the Family Court, which began to operate on Jan. 1, 1949.
28. Equivalent to a District.
29. These persons are appointed from among university graduates in sociology, psychology and education who had passed the examination held by the Supreme Court.
30. They are not government officer, and are appointed on yearly basis on the basis of their social conscience and moral spirit.
The Family Affairs Division of the Family Court has a very broad jurisdiction encompassing all disputes and conflicts within the family as well as domestic affairs which are of legal significance. Thus maintenance, guardianship and custody matters are subject to the jurisdiction of the Family Affairs Division.

All criminal cases concerning minors must first be sent to the Family Court for investigation and hearing. However, if the juvenile is above 16 years of age and has committed a heinous offence or is found having criminal nature, the case may be referred for the normal criminal action. Children under 14 years of age are primarily handled by the Child Guidance Centre and come under the jurisdiction of the Family Court only if the Child Guidance Centre determines that Court should deal with the matter or the Centre feels that some compulsory measure such as restrictions of personal freedom, are required. The procedure at these courts and the measures they can pass are near to those adopted under the Indian Children Act, 1960.

Adults who have committed acts injurious to the welfare of juveniles are also subject to the Family Court's Jurisdiction, whether they have committed the special offences against the child prescribed under the Child Welfare Law or the Labour Standards Law, or the School Education Law etc. But in this case the procedure followed is the same as in a criminal case. It is conducted in open court with the Family Court Judge wearing the robes of a criminal court judge.

The Family Courts of Japan functions much like a social welfare organisation. Persons involved in problems which have not yet been brought before the court in a formal action, interested parties who are troubled over juveniles, may seek counselling from the court as to how the problems should be solved or as to what formal action is necessary. The service is performed chiefly by

Probation Officers and clerks of the Family Court.

One more feature worth pointing of the Japanese Family Court system is that there are Family Court Research Clerks who with their knowledge in medicine, psychology, sociology and economics, carry out research in relation to cases concerning juvenile delinquents or domestic relations. They may also serve as Probationary Officers for juvenile delinquents. Then there is a Training and Research Institute, established by the Supreme Courts which provides training particularly to Probation Officers.

(vii) Poland - Certain legal systems provide for Guardianship Courts to exercise jurisdiction limited to the parent-child or the guardian-child relations. For instance, at the Polish System the Guardianship courts perform a protective function in respect of children. These courts are parts of the District Courts which also has a separate juvenile section. The function of such Guardian Courts are appointment and removal of guardians, passing adoption orders, suspension orders or deprivation of Parental Authority over the child. It may place a child with foster parents or in an educational institution at the expense of the person liable for maintenance, it may also appoint a curator for the management of the child's property.

(b) The Best Alternative of Reform

The pattern of judicial child care thus varies from system to system, providing us with at least three alternatives, for the contemplated reform. The first model is that provided by the English legal system which basically divides the jurisdiction over children nearly on the same pattern as exists in India, with only a change in the nomenclatures of the courts but there is

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32. Ibid. See also JAPANESE LEGAL SYSTEM, Ed. Hideo Taneka (1976) University of Tokyo Press.
33. They are called Ketai Saibensho Chosaken.
34. See, Courts Act, 1947, Article 10.2; Domestic Proceedings Rules, 1947, No.15, Juveniles Act, 1948, C-168, Article 7,8(2), 13,17(1), 25.
37. Article 110.
38. Article 111.
a complete integration of judicial and administrative approach in child care and protection as it exists at present. All civil courts are fully empowered to pass 'care order' and 'supervision orders' in nearly all contingencies of physical and moral danger to the child. A child in the guardianship of the parents may also be brought under the 'supervision order' or given to the care of the local authorities if his moral or material security is threatened.\(^40\)

The courts are assisted by the Welfare Officers and the staff of the local authorities, which provide a necessary link between the child, the parents or guardians and the court.

Thus the first mode of reform may be to confer on all civil courts in India now exercising jurisdiction over children powers similar to the English civil courts viz. to pass 'care order' committing any child found during proceedings to be in need of care to the children home or any other institutions established either by the local authorities or any other child welfare authority to be created at the administrative level. All parents, guardians or custodians should be liable to be put under 'supervision'. In suitable cases the court should be empowered to make a child a 'Ward of the Court'. The court be also authorised to pass 'custodianship orders' to bring defacto guardians subject to regulation and supervision. The anomalies in the jurisdiction and powers of both the civil courts, the criminal courts, children courts and Welfare Boards, as have been pointed out, should be removed and the gaps filled. This may be further improved by designating one Additional District Judge in each District as the Children's Judge and all family matters and Children's civil causes may be transferred to him by the District Judge, even if they are filed in a subordinate court e.g. legitimacy, maintenance or adoption suits. Thus the existing system may be refined to make it child-oriented even on the civil side, without disturbing much the present set up and hierarchy of courts.

\(^{40}\) See, Generally, The Children and Young Persons Acts 1933 to 1969 as amended by the Children Act, 1975, see also 1969 Act, Sec.1(2).
The second alternative is that provided by the Australian and the Canadian Family Courts systems. At those systems the criminal proceedings are disposed of by juvenile courts and all family law matters involving children e.g., matrimonial causes, declaration of legitimacy status, alimony and maintenance, access and up-bringing of children, adoption, guardianship are heard by a separately constituted forum viz., the 'Family Courts.' It may be pointed out that the system of Family Court proposed by Canadian Law Commission improves upon the Australian system. It also seeks to include 'child neglect' and 'inter spousal assaults of minor nature in the jurisdiction of the family court, thus bringing all matters pertaining to children of civil nature before a unified forum.

The Family Court's movement has gained momentum in India also. It has been mooted at deliberations in various seminars, conferences and juristic writings.

The Law Commission of India in its 54th report, which relates to the modification of the Code of Civil Procedure, has also recommended for the establishment of the family courts. It observed:

It is now increasingly realised that:

(i) As far as possible, an integrated broad based service to families in trouble, should become a part of court system.

(ii) Existing courts structure should be so organised that one single court should deal with the problem of preserving families, and

(iii) The conventional procedure dominated by the adversary litigation system may not be appropriate for disputes concerning the family.

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42. For example, Seminar on Women and the Law, held at New Delhi, in October, 1981.

42A. e.g., Paras Diwan, 'The Family Court' a paper presented at the National Family Law Conference held at Chandigarh, January, 1982; Khodie, N. 'Family Courts and Marriage Counselling Service' Ibid; Paras Diwan, 'Matrimonial Litigation; Need for a Family Court' a paper presented at the Seminar on Hindu Marriage Act in 1975; Paras Diwan 'Adjudication in respect of Children', Need for a Family Court, Law and Commonwealth (1969); Seminar on Women and the Law' held at New Delhi in October, 1981.
Though no details are provided by the Commission in the jurisdictional, structural and procedural aspects of such courts, as appears from the wordings of the recommendations the proposed family court is supposed to hear only those matters which are now covered by the family law area, which of course includes matters of legitimacy, guardianship, custody and maintenance etc. and there is no indication that it will include the care proceedings of the welfare boards under the Children Act, 1960 or the juvenile courts under state laws in respect of neglected and such children.

It may be submitted that attention of the state has not been drawn so far towards the need of a reform in the judicial machinery from the perspective of, and suitability to the children. For this reason the recent amendments\(^{43}\) made under the Civil Procedure Code, adding Order XXXII-A relate more to procedural aspects in inter-spousal disputes than guardianship or custody matters. It banks upon privacy and conciliation than providing an alternative care and protection to children, placed in an atmosphere which may prove to be of material and moral danger to the child. It may be said that Order XXXII-A has no sign of child-orientation. If Order XXXII-A is a precursor of the family court functioning, then it hardly fulfils the needs of the children. It would be just another district court for family affairs.

If we adopt this system of family courts then to make it serve the cause of children, its jurisdiction and powers should at least be brought at par with the Canadian Family Court model having jurisdiction not only over normal children but all children in need of care and protection except the delinquent ones. Besides it, the good features of the Australian Family Court system should also be adopted. This will also save us from the necessity of establishing welfare boards, separate from juvenile courts to save the non-delinquent children in need of care from an infectious atmosphere of the proved criminal minded children. It would be less expensive and administratively more efficient and suitable.

\(^{43}\) The Civil Law (Amendment) Act, 1976.
Thus there would remain only two forums for children, the civil and care proceedings being subject to the jurisdiction of the Family Courts and the delinquent children being dealt with by the Children Courts or Juvenile Courts as it present. But such family courts must have all the powers in respect of children as submitted under the first model e.g. on the pattern of English courts powers and be equally equipped with proper support services.

The third alternative is the model provided by the integrated Family Court System of Japan, elaborately indicated above. The Japanese family courts as has been discussed provide an 'all under one roof service'. It is 'three-in-one' or rather 'four-in-one' device. This court exercises jurisdiction not only over juvenile delinquents and non-delinquent children and children's causes falling under the family law area viz. support, guardianship, reliefs required due to matrimonial causes, etc. but also deals with the 'adults' who commit wrongs and offences against the child. Thus all kinds of jurisdictions relating to child civil, criminal, care and protective are vested in the same court. Though the court functions in two divisions viz. the Juvenile Division and the Family Affairs Division yet the Family Court is one and integrated.

In this writer's submission the Japanese system of Family Courts provides the best model of judicial forum from the children's perspective, although certain improvements may always be made.

(C) A FRAMEWORK FOR THE INTEGRATED FAMILY AND CHILDREN COURTS

It is neither the nomenclature of the court, nor the placement of judiciary under 'two in one' or 'three in one' divisions under the family court system, nor the separately existing courts civil and juvenile, exercising different kinds of jurisdictions over children which matters, it is the integration of the whole arena of juvenile justice which counts. If the structure and functioning of the judicial machinery dealing with children whether
unified or separate is so devised that when exercising jurisdiction in respect of children, it is fully child-oriented and the court is fully equipped with powers and auxiliary services to impart justice to children in all contingencies, juvenile justice may serve its purpose.

As submitted above, our first choice in reforming the juvenile justice system should go in favour of the Japanese model of Family Court system which provides a unified and integrated judicial forum to the children, where the children's causes are diagnosed and treated in their family context. In such systems the fragmentation of jurisdictions and the possibilities of overlapping and gaps is diminished, and the children and parents are provided with an easily accessible, informal and certain forum.

Alternatively it is submitted that in case the first choice does not find favour and family courts are established on the pattern of the recommendations of the Law Commission in its 54th report, then the Australian and Canadian family courts system may provide us a good source to borrow for the variety of jurisdictions. In such a case the family court should be given the powers now exercisable by the welfare boards under the Children Act, 1960 in respect of all categories of neglected children.

The following submissions are made on the different aspects of the structure and functioning of the new system of integrated and child oriented system of judicial forums keeping in view the Japanese system of family courts.

The organisation of the family and children courts, the nature and extent of the jurisdiction of its two divisions, the procedure before such courts, the provisions for appeals and appealable court and reference etc. should be included in one chapter, while the other chapter of this part, should regulate the creation or recognition mode of working, the duties and supervision of the various auxiliary services whether as part of the court or affiliated to it by certification or recognition etc.
(i) **Organisation of the Court**: The nomenclature of the new court should be 'The Family and Children Court'. It will easily convey the broad jurisdiction of the court. Its status should be of the level of a District Court and it should be placed under the supervisory control of the High Court. The court should consist of a number of 'Family Judges' and 'Children Judges' to be appointed by the State with the aid of the High Court, according to the needs of each district. The court may be allowed to go in circuits to the sub-divisions or tehsils of the district so that they are easily accessible to those who need them. The court should also have a full-fledged auxiliary services as its essential part. There should also be a provision for research and training. To this aspect we shall revert later.

(ii) **Qualification of Judges**: The Family Judge and Children Judges should be of one cadre only otherwise the special set up may lose its objective. The emphasis should not be on the academic qualifications but the aptitude and special knowledge of family laws and children's laws. The judges should preferably be holders of a Master's Degree with Family Laws specialisation or a Bachelor of Law with some diploma in Family and Children's Laws. The special Judges may be drawn from three sources viz- the Judiciary, the bar and the law teachers. Ten years practice at the bar for holders of Bachelor's Degree and seven years for holders of Master's Degree, or a similar experience of teaching or research in family and children's laws should be the minimum academic qualification. In case of the Judges to be drawn from the judiciary, a minimum ten years experience should be there with evidence of special interest in family and children's laws.

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44. See Sub-head 'Support or Auxiliary Services' of this Chapter.

45. Special diploma courses in Family and Children's laws should be initiated by the Law Faculties of certain universities in every region of the country.

46. It is submitted that Children's law should be made an integral part of the system of law course for the LL.B. and LL.M. studies respectively either as a separate subject or as part of the Family Law Paper. The new children jurisprudence is the product of 20th century and deserves recognition at the academic level.
All the judges, child welfare officers, experts and others involved in the administration of justice to children should be required to go for a training or re-orientation course in juvenile justice and child welfare before joining and at intervals respectively to be organised by the State.

(iii) Jurisdiction of the Family and Children Court: The new family and children court should function in two Divisions as follows:

1. **The Children Division**: It should exercise jurisdiction first over children under 18 years of age, who are either delinquents or uncontrollable or any other category of the neglected children now covered under the Children's Act, secondly, over the adults who commit the special offences against the child as described under the Children Acts or the Labour Acts, Education Acts and such other laws. When exercising jurisdiction over adults the children's Court will act as an ordinary criminal court.

2. **The Family Division**: It should handle all types of family law matters including matrimonial causes, guardianship, custody, access, maintenance, education, adoptions, legitimacy and legitimisation of children. Inter-spousal assaults, familial assaults, inter-spousal and inter-familial torts of minor nature as may be prescribed, should also be disposed by the Family Division.

(iv) Procedure: The process in a juvenile case involving delinquent or neglected children should commence with any person interested in the welfare of the child informing the children's judge of the fact of child-neglect, cruelty or exploitation. Information may also be given by the Child Welfare Officer attached to the court, or the Child Guidance Centre or a Juvenile Police Officer.

The procedure at the court should be non-adversary, informal and inquisitive. This would be possible with the aid of the auxiliary or support service, they being obliged to perform their respective jobs including pre-trial investigations where necessary,
a medical and psychiatric examination and personality test at the Child Guidance Centre, whether attached to an observation home or to the court. Free legal aid should be made available to the child, if it is found to be necessary in suitable cases. The Canadian law commission recommended the following guidelines on the point:

(i) The rules should be worded simply and should indicate clearly the whole range of procedures from the commencement of an action to its conclusion, including the means of enforcing a judgement.

(ii) Procedures should be flexible and reflect the nature of the diverse problems covered by family.

(iii) The rules should, where possible, provide standard forms for use in the various types of proceedings and these forms should be easily adaptable to the circumstances of each case.

(iv) Pleadings and procedures should stay away from the traditional adversary or fault oriented approach.

(v) Pre-trial procedures should be included, designed to provide dignified means for the parties to reconcile their differences or reach available settlement without the need for trials.

(vi) Each litigant should be advised of any right to counsel and, where children are involved, an early opportunity should be provided to ensure that the child's rights are adequately protected.

(vii) Issues should be determined without any prejudicial delay. This is particularly significant with respect to the placement of children, whether in custody, guardianship or adoption proceedings, or in proceedings involving child neglect or juvenile delinquency.

Section 27 of the central Children Act 1960 provides a sound rule in laying down that as far as practicable, any inquiry regarding a delinquent or neglected child should be held in a building or room different from that in which the ordinary sittings of civil and criminal courts are held. The role of police in children's causes shall also have to be defined and a separate juvenile police unit should be set up in every district. On other procedural aspects the Children Act, 1960

47. This aspect has been discussed under Chapter XII of this work.
provides a modern scheme and the same may be followed at the proposed Family and Children Court with necessary modifications in certain aspects of its functioning as pointed out in this work.

(v) Family and Children Court of Appeal: To hear the appeals against the orders of the Family and Children Courts a Family and Children Court of Appeal should be established, at Divisional levels or one court of Appeal for two divisions of the State depending upon the number of cases. Its status should be equivalent to that of a Tribunal under the Income Tax Act, 1961. Its Judges should be chosen from amongst the Judges of the Family and Children Court having a minimum experience of seven years as such Judges, or lawyers practising before the appellate or other higher courts for seven years, or before the Family and Children Courts for ten years or law teachers or research scholars specialising in children and family laws having such experience for ten years. The Family and Children Court of Appeal should have certain non-judicial welfare experts e.g. an expert in child welfare, psychology, or sociology etc. to judge the propriety of non-judicial aspects involved in the case at the lower level by sitting on the Bench and taking part in the decision.

The Appellate Court should act in a Benches consisting of atleast three members, of which two should be judicial one non-judicial. The non-judicial member should be chosen according to the nature of the case. Provisions should be made empowering the Appellate court to seek opinion from any other expert e.g. medical, educationist or agency or to call for further information from any person. It should also have authority to order for the child to be brought before the court. On matters of fact the decision of the Children court of Appeal should be final. Not more than one appeal should be allowed against the orders of the Family and Children Court.

(vi) **Reference to High Court**: Analogous to the procedure provided under the direct tax enactments in India\(^49\) if any party feels aggrieved by the judgement of the Family and Children Court of Appeal it should be allowed to move an application to the Tribunal for sending a reference to the High Court. The Tribunal may even refuse to send such reference, if in its opinion no such point of law is involved.

A Family and Children Bench should be constituted at every High Court to deal with all matters involving children including petitions. The Judges of this Bench should also have a proved child-orientation, being specialised in family and children's laws. Certain High Court judges should be appointed for sitting on such Bench, from among distinguished family and children lawyers or experienced Judges of the Family and Children Courts of Appeal or distinguished research scholars or teachers of family and children's laws.

The High Court should retain its writ jurisdiction under Article 226 as at present and supervisory jurisdiction under Article 227 of the Constitution of India, over all Family and Children Courts in the State.

(vii) **Appeals to Supreme Court**: The Appeals against the judgement of the High Court shall lie as at present on points of law only\(^50\). But at the Supreme Court also appeals relating to children's causes should be assigned to a special Bench of Family and Childrens Matters and the judges on this Bench also should be experts in family and children's laws who have distinguished themselves in the field.

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50. Such appeals are governed by Articles 133 and 136 of the Constitution. Under Article 133 Appeal may be filed against the judgement or order of a High Court, if it is certified fit for appeal by the High Court, while under Article 136 the Supreme Court may grant special leave to appeal against any judgement, decree, sentence or order etc. made by any court or Tribunal.
(D) SUPPORT OR AUXILIARY SERVICES

Our inquiry reveals that the children courts under the Children Act, 1960 have been provided with certain support services, but the civil courts have to do it all alone. Almost all advanced systems provide support services as part of the framework of a family court, a guardianship court or even a civil court exercising jurisdiction, though some difference in their pattern exists. Even if we do not opt for the Family court system, support services must be provided to the civil courts now exercising jurisdiction over children.

The objective behind providing the support services to the courts is manifold. First, the courts cannot be supposed to themselves investigate the facts and some independent agency is needed to investigate facts, to supervise, to conciliate, or reconcile and to provide alternative public care facilities. Secondly, since the process of juvenile justice is diagnostic and needs expert knowledge, the court cannot render the real justice unless the medico-psycho facts about the child are before it. Then there is also the need for an enforcement agency to oversee that the orders of the court in respect of the child are properly carried out. It is therefore submitted that the following support services should be brought in the framework of the proposed Family and Children Court:

(i) Counselling and Conciliation service.
(ii) Investigative service.
(iii) Experts service.
(iv) Alternative care service.
(v) Legal aid service.
(vi) Supervisory service.
(vii) Enforcement service.
(viii) Research and training.

51. See, Chapter VIII of this work.
52. See, the earlier part of this Chapter.
53. Alternatively such support services should be made available to the courts now exercising jurisdiction over children, civil or criminal.
(i) Counselling and Conciliation Service: The pre-adjudication counselling services are available at all systems having family courts e.g. Japan, Australia, Canada etc. The laws constituting these courts invariably make these courts as 'helping courts'. A staff of Court Counsellors is attached to the court to help the parties to settle their problems. In Australia for instance, people may approach the Court Counselling Service directly in person, in writing, by telephoning or through a legal advisor. Many disputes are solved this way.

The same set of staff usually discharges these services for the statutorily required conciliation efforts by the court as a last resort to stabilise the marriage and save the children from consequential evils. But if conciliation efforts fail and the marriage is broken this service again is there at the disposal of parties to make the separation smooth and to help make arrangements for children through a post adjudicatory counselling to the parties.

This indicates the need to have the three-tier counselling, conciliation and reconciliation services as part of the proposed Family and Children Court.

(ii) Investigative Services: An investigative service is provided to the court to act as independent fact finding agency. It adds to the non-adversarial nature of proceedings as well as assists the court in arriving at a proper decision. The children courts constituted under the Children Act, 1960, already have this service at their disposal through the Probation Officer.

The Act imposes a duty upon the Police Officer incharge of the police station to which a delinquent child is brought to immediately inform the Probation Officer of such arrest in order to enable him to obtain information regarding the antecedents and family history of the child and other material circumstances likely to be of assistance to the children court for making the inquiry.
A Welfare Board may also order the Probation Officer to make any investigation in respect of a neglected child. A similar service should be made available to the Family and Children Court.

(iii) Expert Service: Children's causes specially those relating to delinquents, uncontrolable and neglected children are based on juvenile philosophy of treatment, training and reform. Proper diagnosis of every child's mental health and psychology becomes necessary to know about his personality. The Family Court of Japan is equipped with a separate medical clinic manned by a team of Physicians, Psychiatrists and such experts. For the personality tests a child may be referred to a Child Guidance Clinic. The investigation report and the medical and psychological examination reports, provide the Family Court with a certain factual knowledge about the body, mind and family back-ground of the child. It helps a lot in prescribing the suitable measure for each child dependent on his conditions.

The Family and Children Court should have a panel of experts as an auxiliary service, whether as a permanent staff, if the cases are more or on an ad-hoc basis, such experts being drawn from among private practitioners and psychiatrists on a 'to serve on call' basis, to be paid case-wise or with an yearly honorarium. Similarly, services of a Child Guidance Clinic should be made available to every Family and Children's Court.

(iv) Alternate Care Service: Under English law all civil courts are empowered to pass 'Care Orders' in respect of those children who are placed in situations of moral or physical danger to their person. Such children are committed to the care of the local authorities. In India the Children Acts provide the short-term and long-term institutional facilities to delinquent and other children in need of care, but the civil courts have no such institutional services whether short-term or long-term, at their disposal. Submission has been made for conferring on all courts dealing with children to pass similar 'care orders' and place

58. Section 35(c) Children Act, 1960.
60. See, Chapter VIII of this work.
the children to an observation home or a children home, as the case may be, wherever they are found in need of care and protection, pending enquiry or after decision. Family and Children Courts must have both the powers and the aid of an alternative care service either by way of children home, a local authority or any other institution.

(v) Legal Aid Services: Legal aid to the indigent these days, is considered by the jurisprudents to be the service content of law. The Law Commission of India in its 14th report has thus observed:

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..... equality is the basis of all modern systems of jurisprudence and administration of justice..... In so far as a person is unable to obtain access to a court of law for having his wrongs redressed or for defending himself against a criminal charge, justice becomes unequal and laws which are meant for his protection have no meaning and to that extent fail in their purpose. Unless some provision is made for assisting the poor man for the payment of court fees and lawyers fee and other incidental costs of litigation, he is denied, equality in the opportunity to seek justice.
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An Expert Committee on Legal Aid headed by Mr. Justice Krishna Iyer has identified children and youth among those who deserve legal aid. Another committee was appointed by the Government of India, under the Chairmanship of Justice Bhagwati of the Supreme Court of India, which has also emphasised the need to provide free legal aid and advice to those litigants who are likely to be deprived of legal justice, if it is not availed to them. Under the modern thought legal aid is not considered as a charity but as a matter of right.

In the context of children who can not defend themselves as delinquents or plead their cause as neglected, the responsibility should lie upon the Family and Children Courts not to allow any case involving a child going unrepresented by a lawyer or wherever it decides to institutionalise him, because one aspect of institutionalisation, specially in case of the delinquent

64. Ibid, pp.27-34.
65. SOCIAL LEGISLATION IN INDIA, Ibid.
children, is to deprive him of his fundamental right to freedom. If there is no body to arrange legal aid to the child the court should itself arrange it. Therefore, every Family and Children Court should have an attached Legal Aid Service. A panel of lawyers may be easily made out of certain benevolent and charity minded lawyers to do the service honorary, else the court should arrange it against payment.

(vi) Supervisory Service: In certain contingencies the court though finds that the parents or guardians are not looking after their child properly, but the neglect is not of such a magnitude as to remove the guardian or remove the child from the custody of the parent and commit him to institutional care. Under the English law both the civil courts and juvenile courts may pass supervision orders and place the child under the supervision of a Probation Officer or welfare Officer of the local authority. In case of delinquent the child may also be the subject of a supervision due to his criminal tendencies.

In India, the Children Act, 1960 empowers the court to place a delinquent child under the supervision of a Probation Officer and a neglected child in the supervision of any other suitable person. No such powers or support service is however, available to the civil courts. The proposed Family and Children Court must have powers to pass supervision orders, and also provide with the auxiliary services of supervisors, paid or honorary. The court should have a panel of honorary social welfare workers who may also be assigned the job of supervisors, besides the Probation Officer or the Child Welfare Officer attached to the court.

(vii) Enforcement Service: An important adjunct of the Family and Children Court should be the post adjudicatory enforcement service. Merely passing an order against the parent or guardian to pay a maintenance allowance to the minor children is no surety that the payment shall be made or that it shall reach the child. An unexecuted order is as good as no order. This may happen to

66. Article 19 Constitution of India.
any order of the court in favour of the child. Unless there is some specified agency to over-see the proper implementation of the court's orders, the objective of conferring a special right upon the child under the substantial law and establishment of a specialised forum to provide justice become futile, as it is liable to fail at the delivery stage. To make the process of juvenile justice really integrated and to ensure it up to the last linkage, the provision for an enforcement service is essential for the due execution of the court's orders. In the view of the Canadian Law Commission the following should be the part of the duty of an enforcement service:

(i) Receipt and disbursement of moneys paid under court orders.

(ii) Maintenance of records and accounting system to ensure an up-to-date picture of the status of the Court's orders.

(iii) To take appropriate action to ensure that any default is explained, and where necessary, to ensure that the default is made good.

(iv) Development of an effective system of tracing the spouse or parent who has disappeared.

(viii) Research and Training: As pointed out above certain Family Court systems have set up their independent Research and Training units as an integrated part of juvenile justice system. Thus the Supreme Court of Japan which is the supervisory body of the Family Courts of Japan has established a Training and Research institute exclusively for the training of the Probation Officers. Research clerks are attached to every Family Court to process data and conduct research evaluations on different aspects of the juvenile justice as a routine business.

The Australian Family Law Act, 1975 creates Research Bodies, the Family Law Council and Institute of Family Studies. Similar separate research bodies relating to children's causes exist under the Canadian and other legal systems.

68. See, the early part of this Chapter.
Looking to the special nature of the children's jurisprudence all judges of the Family and Children Court must undergo some training in the children's laws and the family laws and some course in child psychology, sociology and child welfare. Some kind of child orientation is also essential for the other machinery dealing with the child in the process of administration of justice viz. the staff of the support services and the advocates. There should be arranged Refresher courses at regular intervals to communicate the latest horizons in the juvenile philosophy to those who are the real persons who should know it.