IDEA OF LAW: AN ANALYSIS

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RESEARCH METHODOLGY

Aims and Objectives:

The very purpose behind doing this project work is to highlight the various key aspects of Idea of Law. This project aims at elaborating upon the concepts of legal positivsm in order to explore the theories given by various jurits. The objective of this project is to focus more upon the theories of Austin then Kelsen and finally then theory given by Hart connecting to Indian system.

Scope and Limitations:

Due to various constraints, the project is limited to a brief discussion of the points set above and focusses upon that in a brief manner to be academically viable and significant. It deals with development of entrepreneurship skills of law graduates in particular and its scope has been confined to that only.

Method of Writing:

A systematic method starting with introduction of the concerned topics followed by a detailed critical analysis of the same has been opted as the method of writing, followed by conclusion and suggestions.

Sources of Data:

 Books

 Internet Secondary sources of data have been used while researching for the paper. Doctrinal Research methodology has been opted for doing this project.

Study Methodology :

While doing the critical analysis of sections the analytical study methodology was opted.

Chapterisation:

The project have been divided into various chapters each dealing with different aspects of the topic. In the initial chapters, brief synopsis has been given which deals with an introduction of the topic. The topics have been dealt in great detail in subsequent chapters with a special chapter on suggestion and conclusion.

CONTENTS

INTRODUCTION

The idea of law is very wide topic so I am restricting my research on legal positivism because in idea of law all jurists are included and all schools of jurisprudence are included.

Legal positivism is a philosophy of law that emphasizes the conventional nature of law—that it is socially constructed. According to legal positivism, law is synonymous with positive norms, that is, norms made by the legislator or considered as common law or case law. Formal criteria of law's origin, law enforcement and legal effectiveness are all sufficient for social norms to be considered law. Legal positivism does not base law on divine commandments, reason, or human rights. As an historical matter, positivism arose in opposition to classical natural law theory, according to which there are necessary moral constraints on the content of law.

Legal positivism does not imply an ethical justification for the content of the law, nor a decision for or against the obedience to law. Positivists do not judge laws by questions of justice or humanity, but merely by the ways in which the laws have been created. This includes the view that judges make new law in deciding cases not falling clearly under a legal rule. Practicing, deciding or tolerating certain practices of law can each be considered a way of creating law.

Within legal doctrine, legal positivism would be opposed to sociological jurisprudence and hermeneutics of law, which study the concrete prevailing circumstances of statutory interpretation in society.

The word "positivism" was probably first used to draw attention to the idea that law is "positive" or "posited," as opposed to being "natural" in the sense of being derived from natural law or morality.

AUSTIN THEORY ON LEGAL POSITIVISM

Austin's analytic approach to law offered an account of the concept of law, that is, what law is. This was termed "Legal Positivism" because it set out to describe "what law is" in terms of what humans posited it was, thus the link between "positive law" and "Legal Positivism."
Austin's theory of law is a form of analytic jurisprudence in so far as it is concerned with providing necessary and sufficient conditions for the existence of law that distinguishes law from non-law in every possible world. Austin's particular theory of law is often called the "command theory of law" because the concept of command lies at is core: law is the command of the sovereign, backed by a threat of sanction in the event of non-compliance. Legality, on this account, is determined by the source of a norm, not the merits of its substance (ie it embodies a moral rule). Thus, the answer to the question "what is law?" is answered by resort to facts not value. On Austin's view, a rule R is legally valid (i.e., is a law) in a society S if and only if R is commanded by the sovereign in S and is backed up with the threat of a sanction. The relevant social fact that confers validity, on Austin's view, is promulgation by a sovereign willing to impose a sanction for noncompliance. If what makes a rule a legal rule is not determined by its content but by its source, then why should we obey the law under Austin's account? Well, to avoid sanction - since the theory of law, under this account, provides a reliable prediction of what will befall a person, at the hands of those in charge, if you disobey the law. Not a particularly compelling ground upon which to build a theory of why we have a duty to obey law. [1]H.L.A. Hart, in A Concept of Law sought to provide a positivist account of law that at once improved upon that developed by Austin and destroyed Austin's central concept: the command theory of law. A Concept of Law was a step by step effort to provide an account of the nature of law that i) rejected the notion that law's moral force was grounded in morality, and having done so, ii) provided an analytic account of the criteria of legality: the criteria a norm must satisfy in order to count as a legal norm.[2]

Legal positivism has a long history and a broad influence. It has antecedents in ancient political philosophy and is discussed, and the term

[1] John Austin, Lectures on Jurisprudence and the Philosophy of Positive Law (St. Clair Shores, MI:Scholarly Press, 1977)
[2] H.L.A Hart, The Concept of Law(Oxford Claredon Press,1994)p.84

itself introduced, in mediaeval legal and political thought. The modern doctrine, however, owes little to these forbears. Its most important roots lie in the conventionalist political philosophies of Hobbes and Hume, and its first full elaboration is due to Jeremy Bentham (1748-1832) whose account Austin adopted, modified, and popularized. For much of the next century an amalgam of their views, according to which law is the command of a sovereign backed by force, dominated legal positivism and English philosophical reflection about law. By the mid-twentieth century, however, this account had lost its influence among working legal philosophers. Its emphasis on legislative institutions was replaced by a focus on law-applying institutions such as courts, and its insistence of the role of coercive force gave way to theories emphasizing the systematic and normative character of law. The most important architects of this revised positivism are the Austrian jurist Hans Kelsen (1881-1973) and the two dominating figures in the analytic philosophy of law, H.L.A. Hart (1907-92) and Joseph Raz among whom there are clear lines of influence, but also important contrasts.

Legal positivism's importance, however, is not confined to the philosophy of law. It can be seen throughout social theory, particularly in the works of Marx, Weber, and Durkheim, and also (though here unwittingly). These writers all acknowledge that law is essentially a matter of social fact. Lawyers often use "positivist" abusively, to condemn a formalistic doctrine according to which law is always clear and, however pointless or wrong, is to be rigorously applied by officials and obeyed by subjects. It is doubtful that anyone ever held this view; but it is in any case false, it has nothing to do with legal positivism, and it is expressly rejected by all leading positivists. Among the philosophically literate another, more intelligible, misunderstanding may interfere. Legal positivism is here sometimes associated with the homonymic but independent doctrines of logical positivism (the meaning of a sentence is its mode of verification) or sociological positivism (social phenomena can be studied only through the methods of natural science). While there are historical connections, and also commonalities of temper, among these ideas, they are essentially different. The view that the existence of law depends on social facts does not rest on a particular semantic thesis, and it is compatible with a range of theories about how one investigates social facts, including non-naturalistic accounts.[3]

Hence, most traditional "natural law" moral doctrines--including the belief in a universal, objective morality grounded in human nature--do not contradict legal positivism. The only influential

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[3] A Companion to Philosophy of Law and Legal Theory (Patterson ed. 1999) p. 244-46

positivist moral theories are the views that moral norms are valid only if they have a source in divine commands or in social conventions. Such theists and relativists apply to morality the constraints that legal positivists think hold for law.

KELSEN PURE THEORY OF LAW

Kelsen's theory which is known as Pure Theory of Law implies that law must remain free from social science like psychology, sociology or social history etc. Kelsen's aim is to establish a science of law which will be pure in the sense that it will strictly eschew all metaphysical, ethical, moral, psychological and sociological elements. Kelsen defines law as an order of human behavior. The specific nature of this order consist:

1. In it's being coercive
2. In the fact that this coercive power is derived solely from the sanctions attached to law itself.

His sole object was to determine what can be theoretically known about law of any kind at any time under any conditions. The essential foundation of Kelsen's system may be summarized as under:

1. Legal theory is science not volition. It's the knowledge of what the law is, not of what the law ought to be
2. Law is normative not a natural science
3. Legal theory is a theory of norms, it is not concerned with the effectiveness of legal order
4. A theory of law is formal, of the way of ordering changing contents in a specific way
5. The relations of legal theory to a particular system of positive law is that of possible to actual law

The most significant feature of Kelsen's theory is the idea of norms. To Kelsen, jurisprudence is knowledge of a hierarchy of norms. A norm is simply a pre-position in hypothetical form, if one event happens then another event should happen. Jurisprudence includes all norms created in the process of applying some general norm to a specific norm. According to Kelsen a dynamic system is one in which fresh norms a re constantly being created on the authority of the original or basic norm, while a static system is one which is at rest in that basic norm determines the content of those derived from it addition to imparting validity to them. [4]

[4] Dr. B.N Tripathi, (Jurisprudence) p. 67

According to Kelsen legal norms cannot be derived from conflicting authorities. A judgment for example derives its authority from as order ion counsel, the order from an act of parliament, from the constitution between the sources of legal authority there is a relation of subordination. Ultimately every legal norm in a given legal order deduces its validity from basic norm i.e. Grund norm. This fundamental norm itself itself is not capable of deduction, it must be assumed as an initial hypothesis.

H.L.A HART – CONCEPT OF LAW

The Concept of Law (1961) is an analysis of the relation between law, coercion, and morality, and it is an attempt to clarify the question of whether all laws may be properly conceptualized as coercive orders or as moral commands. Hart says that there is no logically necessary connection between law and coercion or between law and morality. He explains that to classify all laws as coercive orders or as moral commands is to oversimplify the relation between law, coercion, and morality. He also explains that to conceptualize all laws as coercive orders or as moral commands is to impose a misleading appearance of uniformity on different kinds of laws and on different kinds of social functions which laws may perform. He argues that to describe all laws as coercive orders is to mischaracterize the purpose and function of some laws and is to misunderstand their content, mode of origin, and range of application.

Laws are rules that may forbid individuals to perform various kinds of actions or that may impose various obligations on individuals. Laws may require individuals to undergo punishment for injuring other individuals. They may also specify how contracts are to be arranged and how official documents are to be created. They may also specify how legislatures are to be assembled and how courts are to function. They may specify how new laws are to be enacted and how old laws are to be changed. They may exert coercive power over individuals by imposing penalties on those individuals who do not comply with various kinds of duties or obligations. However, not all laws may be regarded as coercive orders, because some laws may confer powers or privileges on individuals without imposing duties or obligations on them.

Hart criticizes the concept of law that is formulated by John Austin in The Province of Jurisprudence Determined (1832) and that proposes that all laws are commands of a legally unlimited sovereign. Austin claims that all laws are coercive orders that impose duties or obligations on individuals. Hart says, however, that laws may differ from the commands of a sovereign, because they may apply to those individuals who enact them and not merely to other individuals. Laws may also differ from coercive orders in that they may not necessarily impose duties or obligations but may instead confer powers or privileges.

Laws that impose duties or obligations on individuals are described by Hart as "primary rules of obligation." In order for a system of primary rules to function effectively, "secondary rules" may also be necessary in order to provide an authoritative statement of all the primary rules. Secondary rules may be necessary in order to allow legislators to make changes in the primary rules if the primary rules are found to be defective or inadequate. Secondary rules may also be necessary in order to enable courts to resolve disputes over the interpretation and application of the primary rules. The secondary rules of a legal system may thus include 1) rules of recognition, 2) rules of change, and 3) rules of adjudication.

In order for the primary rules of a legal system to function effectively, the rules must be sufficiently clear and intelligible to be understood by those individuals to whom they apply. If the primary rules are not sufficiently clear or intelligible, then there may be uncertainty about the obligations which have been imposed on individuals. Vagueness or ambiguity in the secondary rules of a legal system may also cause uncertainty as to whether powers have been conferred on individuals in accordance with statutory requirements or may cause uncertainty as to whether legislators have the authority to change laws. Vagueness or ambiguity in the secondary rules of a legal system may also cause uncertainty as to whether courts have jurisdiction over disputes concerning the interpretation and application of laws.

Primary rules of obligation are not in them sufficient to establish a system of laws that can be formally recognized, changed, or adjudicated, says Hart. Primary rules must be combined with secondary rules in order to advance from the pre-legal to the legal stage of determination. A legal system may thus be established by a union of primary and secondary rules (although Hart does not claim that this union is the only valid criterion of a legal system or that a legal system must be described in these terms in order to be properly defined).

Hart distinguishes between the "external" and "internal" points of view with respect to how the rules of a legal system may be described or evaluated. The external point of view is that of an observer who does not necessarily have to accept the rules of the legal system. The external observer may be able to evaluate the extent to which the rules of the legal system produce a regular pattern of conduct on the part of individuals to whom the rules apply. The internal point of view, on the other hand, is that of individuals who are governed by the rules of the legal system and who accept these rules as standards of conduct.

The "external" aspect of rules may be evident in the regular pattern of conduct which may occur among a group of individuals. The "internal" aspect of rules distinguishes rules from habits, in that habits may be viewed as regular patterns of conduct but are not usually viewed as standards of conduct. The external aspect of rules may in some cases enable us to predict the conduct of individuals, but we may have to consider the 'internal' aspect of rules in order to interpret or explain the conduct of individuals.

Hart argues that the foundations of a legal system do not consist, as Austin claims, of habits of obedience to a legally unlimited sovereign, but instead consist of adherence to, or acceptance of, an ultimate rule of recognition by which the validity of any primary or secondary rule may be evaluated.[5]If a primary or secondary rule satisfies the criteria that are provided by the ultimate rule of recognition, then that rule is legally valid.

There are two minimum requirements that must be satisfied in order for a legal system to exist: 1) private citizens must generally obey the primary rules of obligation, and 2) public officials must accept the secondary rules of recognition, change, and adjudication as standards of official conduct.[6] If both of these requirements are not satisfied, then primary rules may only be sufficient to establish a pre-legal form of government.

Moral and legal rules may overlap, because moral and legal obligation may be similar in some situations. However, moral and legal obligation may also differ in some situations. Moral and legal rules may apply to similar aspects of conduct, such as the obligation to be honest and truthful or the obligation to respect the rights of other individuals. However, moral rules cannot always be changed in the same way that legal rules can be changed.

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[5] HLA Hart, The Concept of Law (Oxford Claredon Press, 1994) p.110
[6] ibid, p.116

According to Hart, there is no necessary logical connection between the content of law and morality, and that the existence of legal rights and duties may be devoid of any moral justification.[7] Thus, his interpretation of the relation between law and morality differs from that of Ronald Dworkin, who in Law's Empire suggests that every legal action has a moral dimension. Dworkin rejects the concept of law as acceptance of conventional patterns of recognition, and describes law not merely as a descriptive concept but as an interpretive concept which combines jurisprudence and adjudication.

Hart defines legal positivism as the theory that there is no logically necessary connection between law and morality. However, he describes his own viewpoint as a "soft positivism," because he admits that rules of recognition may consider the compatibility or incompatibility of a rule with moral values as a criterion of the rule's legal validity.[8]

Legal positivism may disagree with theories of natural law, which assert that civil laws must be based on moral laws in order for society to be properly governed. Theories of natural law may also assert that there are moral laws which are universal and which are discoverable by reason. Thus, they may fail to recognize the difference between descriptive and prescriptive laws. Laws that describe physical or social phenomena may differ in form and content from laws which prescribe proper moral conduct.

Hart criticizes both formalism and rule-scepticism as methods of evaluating the importance of rules as structural elements of a legal system. Formalism may rely on a rigid adherence to general rules of conduct in order to decide which action should be performed in a particular situation. On the other hand, rule-scepticism may not rely on any general rule of conduct in order to decide which action should be performed in a particular situation. Formalism may produce such inflexibility in the rules of a legal system that the rules are not adaptable to particular cases. Rule-scepticism may produce such uncertainty in the application of the rules of a legal system that every case has to be adjudicated.

International law is described by Hart as problematic, because it may not have all of the elements of a fully-developed legal system. International law may in some cases lack secondary rules of recognition, change, and adjudication. International legislatures may not always have the power to

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[7] ibid, p.268
[8] ibid, p.250

enforce sanctions against nations who disobey international law. International courts may not always have jurisdiction over legal disputes between nations. International law may be disregarded by some nations who may not face any significant pressure to comply. Nations who comply with international law must still be able to exercise their sovereignty.

In any legal system, there may be cases in which existing laws are vague or indeterminate and that judicial discretion may be necessary in order to clarify existing laws in these cases. Hart also argues that by clarifying vague or indeterminate laws, judges may actually make new laws. He explains that this argument is rejected by Ronald Dworkin, who contends that judicial discretion is not an exercise in making new laws but is a means of determining which legal principles are most consistent with existing laws and which legal principles provide the best justification for existing laws.[9]

Dworkin says in Law's Empire that legal theory may advance from the "preinterpretive stage" (in which rules of conduct are identified) to the "interpretive stage" (in which the justification for these rules is decided upon) to the "postinterpretive stage" (in which the rules of conduct are reevaluated based on what has been found to justify them).[10]A complete legal theory does not merely identify the rules of a legal system, but also interprets and evaluates them. A complete legal theory must consider not only the relation between law and coercion (i.e. the "force" of law), but the relation between law and rightfulness or justifiability (i.e. the "grounds" of law). Thus, Dworkin argues that a complete legal theory must address not only the question of whether the rules of a legal system are justified but the question of whether there are sufficient grounds for coercing individuals to comply with the rules of the system.

Many philosophers would reject Kelsen's view that moral reasons for action only apply to those who choose to endorse morality's basic norm (whatever it may be). Even if Kelsen is quite wrong about this conditional nature of moral imperatives, he may be right about the law. What remains questionable, however, is whether Kelsen succeeds in providing a non-reductive explanation of legal normativity, given the fact that his account of legal validity turned out to be reductive after all. The trouble here is not simply the relativity to a point of view; the trouble resides in Kelsen's failure to ground the choice of the relevant point of view in anything like

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[9] ibid, p.272

[10] Ronald Dworkin, Law's Empire (Cambridge: Harvard University Press 1986)p.66

Reason or reasons of any kind. By deliberately avoiding any explanation of what it is that might ground an agent's choice of endorsing the legal point of view, or any given basic norm, Kelsen left the most pressing

questions about the normativity of law unanswered. Instead of providing an explanation of what makes the presupposition of the legal point of view rational, or what makes it rational to regard the requirements of law as binding requirements.[11]

[11] http://plato.stanford.edu/entries/lawphil-theory/

IN CONTEXT OF INDIA

The Indian legal system is a fairly developed system and consists of both primary and secondary rules. The Constitution of India is the ultimate rule of recognition. Although under Article 51 of the Indian Constitution, it is provided that the State shall endeavour to promote international peace and security and respect its international obligation yet no rule of international law which is in conflict with the Indian Constitution can be binding on the Indian people and courts.

Primary rules of obligation in the Indian legal system include customs which are recognised by courts and various statutes. This is evident from the changing status of customs. Although before independence the Privy Council in Collector of Madura v. Matoo Ramalinga[12] ruled that in Hindu law a clear proof of custom overrides the written text of law, the situation has changed after independence. Only the customs which are recognised and accepted by Parliament or the courts have the force of law. Pre-constitutional laws are given recognition by Article 372 of the Indian Constitution "but subject to the provisions of ... Constitution".

Based on the general acceptance of the people, Hart's legal system comprises of primary rules of obligation and "secondary rules of recognition", "rules of adjudication" and "rules of change". Existing within the framework of certain minimal rules this legal system has enough flexibility to adapt itself to the changing needs. Except for the five truisms, Hart's legal system like Aristotle's Politics is amoral. Principles of morality are no touchstone to test the validity of the rules of legal system. They can, however, become legal rules after passing through the process prescribed by the legal system.

The Indian legal system is a fairly developed legal system comprising of both primary rules of obligation and secondary rules of recognition, adjudication and change. While the primary rules consist of various statutory laws and recognised customs, secondary rules are contained in the Constitution of India. The Constitution of India is based on the philosophy and principles debated and accepted by the people of India during the national movement. Hence, it is "We the People of India" who have framed the general legal framework of our country and therefore feel under an obligation to comply by it. The general legal framework is the source of validity or the "rule of recognition" for other rules and

[12] (1868) 21 MIA 397 (PC)

governmental action. While the Constitution has enough inbuilt flexibility to change itself to the changing needs there are certain minimal rules termed as "basic structure" whose sanctity has to be respected as they comprise the basic framework or identity of our legal system.

As for the "rules of adjudication", the Indian legal system contains a very integrated judicial structure with the Supreme Court of India at the top. The Supreme Court of India and High Courts of the States have the authority to interpret the Constitution also. In the exercise of this power, while basing their judgments on general principles, structure and aims of the Constitution, they have moved beyond the "open texture of law". A clear example of this is the replacement of "procedure established by law" under Article 21 by the "due process of law". [13]

However, it is on the question of morality that the Indian legal system seems to clearly disagree with Hart's thinking. Thus, not only morality is explicitly used in Articles 25 and 26, and implicitly in Article 19(1)(g), even while judging the validity of particular laws against the Constitution of India the Court takes into account moral principles. What is important here is not the actual decisions which can be either way, given the fact that morality is largely subjective, but the consideration of moral principles as part of constitutional values by the courts. This is clear from the views of the judiciary on the two issues of restitution of conjugal rights and the right to die.

[13] (1978) 1 SCC 248

CONCLUSION

Law is too much in a state of flux; society's values are too pluralistic; and the democratic process exposes too many moral and social values to make one content with a rule oriented positivistic approach, or a rigid stare decisis approach. The law should be viewed as a set of principles often inconsistent and in conflict, the choice of which is governed by a decision-maker's perception of appropriate policies. These policies may be political, economic and social and may or may not be directed toward changing society's mores and customs. The decision process further involves a moral judgment of which policies are appropriate.

Jurisprudential schools, and positivism in particular, are struggling with the problem of subjectivity and seeking theories which can be verified externally. However, the human factor does play an undeniably important part in decision-making. Legal positivism seems to underplay the essential validity of sociological jurisprudence, and unduly isolates the moral tenets of natural law. Dworkin seems to be closer to reality by including political morality in his decision-making process.

For the realist, forces of custom, morals and social practice, even if lacking in objective validity, are relevant and are called into play by the subjective application of the decision-maker. The realists are correct

when they call for a conscious realization of the subjective role of the individual decision-maker and the abandonment of the idea that results are dictated.

Positivism obscures too much of what is actually going on in the legal process. If the positivists are correct in indicating that law can be derived from rules, cases or codes, then the element of choice is largely eliminated. If there is no choice, individual predilections play no part and there is very little place for the moral realm. Also eliminated is the concept of a judicial choice between competing interests or decisions as to the proper relation between custom and law. If, with the positivists, we ask only the question of what rules officials accept, this tends to exclude the notion of goal, purpose and function. But in fact decision makers are purposive and are guided by abstract notions of justice and fairness. In indicating the limitations of positivism, however, we must not throw the baby out with the bath. Positive law has reasons for accepting it, such as the expectation interest and a need for order and continuity in the legal sphere. However, when the decision maker accepts positive law, he

makes a moral choice. Admittedly, what remains is not the neat, coherent analysis of primary and secondary rules, but something rather chaotic. But to suggest that there are conflicts between approaches to jurisprudence should not blind us to the fact that there are common and complimentary features. Moreover, the concept of total confusion is psychologically unacceptable. If it were true, we would have to invent a way out.

Individuals who have to manipulate the system cannot live with the idea that it is confusion. While inviting the reader to view the possibility that the legal realm is a jungle, at least some parameters have been narrowed. What we are led to is the addition of elements of natural law, realism, and sociological jurisprudence. Thus we are left with the desirability for a merger of the elements of natural with the positive law.Thus, the world waiting on the other side of positive law is not neat and trim, it is controversial: the sociological analysis with a functional approach is there with its basic question-what is the effect of this law on society? The realists, or at least some realists, would ask the same question once they have cleared the opaque thicket of legal jargon.

Natural law, unless perceived dogmatically, waits also to ask, what are the appropriate moral tenets of the society and, basically, is this the correct result? What remains is not a system in which there is one right answer to hard cases. Perhaps the most crucial problem or crisis in jurisprudence today is the lack of an accepted moral authority and the moral relativity thereof. One other question recurs. If the United States Supreme Court is the secular heir to the legacy of the religious authorities of the past, can it preserve its moral authority in the face of revelations that there is no right answer in hard cases? I would like to believe the answer to that question is yes. But in any event, work can fruitfully be done to refine a model further which would eclectically bring together the best of each of these approaches. It is true that the element of the random, the enigmatic and the mysterious will remain. Perhaps the best evidence of this is the way practitioners respond by combining approaches and shifting them according to the various situations in which they find themselves."' Nonetheless, the building of value systems should be attempted, and dialogue pursued to obtain a consensus on desired values.

Keeping mind todays context law is nothing but facilitator for smooth working of the system which provides rules and regulation as to how society should work providing the guidelines in which one should act upon.

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