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TEMPERING THE ENFORCEMENT WITH LAW: A MODEL OF DIARCHIC LEADERSHIP FOR ENSURING LEGALIST SUPERINTENDENCE IN LAW ENFORCEMENT AGENCIES

Mr. Reghu M, IRS Batch 2015, Kerala Law Academy, University of Kerala, Thiruvananthapuram

ABSTRACT

Rule of law necessitates its due and precise enforcement without any excesses. This paper conceptually analyses the existing and prevalent system of law enforcement and the fallacies therein, including the post facto nature of remedies to violations. The structure of various law enforcement authorities is also considered including direct democratic leadership. The jurisprudence that has arisen with respect to policing reforms is specifically considered to analyse the direction in which a transformational systemic change can be envisioned. The fallacies in the post facto remedies offered through conventional fora like courts, ombudsmen, etc. are analysed to conceive an independent authority within the leadership itself for prevention of violations and excesses. It is proposed to suggest a juridical check to reduce the possibility and extent of misapplication and abuse of power by law enforcement agencies. The suggested remedy is to replace the monarchic politico-civil leadership with a diarchic leadership consisting of an executive officer and an independent judicial officer. The partial juridical superintendence of the law enforcement agency is expected to ensure the legal basis of operations as well as bettering the performance of the agency at large. Reliance is placed on the niche that the judiciary has carved up for itself in upholding the Rule of law, through a cadre of committed judicial servants. It is proposed to co-opt judicial servants into the management of law enforcement agencies. The possibility of conflicts within the diarchic executive is also considered and discussed, along with the possible limitations of the same. The Roman diarchic executive is modelled as an example for designing balanced leadership for law enforcement. The constructive friction that might arise out of diarchic executive is desirable to ensure balanced management and minimal violations of rule of law.

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1. Introduction

Through a social contract, the society has ceded the right to exercise violence to the state and its agents so that the violence is kept minimal and in strict adherence to the rule of law. The state, itself is expected to act in strict concordance with law.[1] All statutory enactments that envision a possibility of the exercise of force intend that the same should be minimal as well as proportional. Hence, even a rare instance of brutality by a law enforcement agency is highly antithetical to the concept of rule of law. It is precisely the tendency, possibility and unchecked discretion for law enforcement authorities to act punitively as well, that undermines the rule of law.

Law enforcement agencies constitute a part of the executive arm of the government. Law enforcement seeks to prevent and deter crimes and other violations of law and norms and also seeks to apprehend, prosecute and punish those guilty of violations.[2] In its widest sense, law enforcement includes courts and prisons as well, along with the core executive corps. Law enforcement agencies undertake enforcement of criminal laws, revenue laws, immigration laws, etc. They are suitably empowered with powers to restrict and arrest, search and seize, undertake surveillance etc. The powers enjoyed are spread across a wide spectrum and their exercise is substantiated and regulated through statutory enactments. A misuse or abuse of the power or its exercise out of jurisdiction warrants due redressal and such mechanisms are usually crafted administratively, including through overarching rights to appeal to judicial forums.

This paper seeks to analyse the existing structure of law enforcement agencies and discern the checks and balances that are systemically built-in to ensure strict adherence to rule of law. The bureaucratic nature of the leadership of law enforcement agencies is compared to other alternative models. The landmark judgement pertaining to police reforms in India is considered in-depth as a template for restructuring. The paper then moves to recommend the judicial superintendence of functioning of law enforcement executives and suggests a diarchic executive with a judicial officer in the leadership. The challenges arising from such a system are analysed in detail. The paper seeks

[1] Frithjof EHM, "Administrative Discretion and the Rule of law", The Rule of law: Concept, guiding principle and framework, European Commission for democracy through law(2010).
[2] Kären M. Hess, Christine Hess Orthmann, Introduction to Law Enforcement and Criminal Justice (2008)

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to provide a solution to the possibility of violations of law by executive authorities through a purposive restructuring of the leadership.

2. Existing mechanisms to monitor and check law enforcement agencies

It is required to understand the nature and extent of violations by law enforcement authorities and the present mechanisms to redress them. The abuse and violations that might occur from the execution of duties by a law enforcement authority, itself needs to be graded. Some excesses may be legal and borne out of bona fide intentions. There are also violations arising out of systemic fallacies and excessive discretion that are granted to the authorities. In addition to these technically legal excesses, there may also be certain rarer violations that are grave and blatantly illegal in nature.

The structure of a law enforcement agency is crucial in understanding the rationale behind its behavior. Usually, the agencies are organized as a cadre of officers and officials in a highly hierarchical and disciplined manner. The hierarchy is usually statutorily specified as well. In certain agencies, the discipline is also instilled through the addition of uniform and system of ranks. The agency executive is the senior-most in the cadre and is responsible to the civilian or political executive.

The executive of the law enforcement agency himself is naturally endowed with superintending powers and the responsibility to ensure adherence to the rule of law. But it is seen that the conflicts that arise from certain ground realities in enforcement, as well as the nature of discipline and hierarchy in the agencies, along with the executive's responsibility to maintain the morale of the force, might stymie these responsibilities. The agency head might not be able to act in a judicious manner.

There are several implicit and explicit procedures and mechanisms in place to monitor law enforcement agencies as well as their adherence to rule of law. Codes of conduct as well as disciplinary rules are present. These are usually to be enforced by the senior officers within the agency itself, or by the executive leadership. All the agencies are directly or indirectly responsible to the political executive, through administrative superintendence as well as financial control. This, in effect, makes the law enforcement agencies indirectly accountable to the people. But this check,

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need not fully translate into strict adherence to the rule of law, particularly in scenarios where the executive connives for political convenience or for any other quid pro quo in the exercise of power.

The preventive enforcement of law, particularly during a crisis may lead authorities to undertake illegal and dehumanizing steps like forcing people to squat and repent; such instances of extra-judicial punishment fly in the face of rule of law. The contextual rarity of such incidents establish that the solitary instances are avoidable and not essential for law enforcement.[3] There is no superintending preventive system to check such incidents, only post-facto lengthy inquiries[4], despite such officers having a coloured record in such practices. In such cases, it is the *suo moto* cognisance of widely publicised excesses that act as deterrence and superintendence in accordance with rule of law[5].

2.1 Elected executives to head law enforcement agencies

In the United Kingdom, police and crime commissioners are directly elected local officials who secure the police force for the area and ensure their efficiency and effectiveness[6]. The police forces are under the direction and control of the Chief Constable, who is accountable to the police and crime commissioner and is appointed and removed by him[7]. Usually, a law enforcement agency is accountable to a minister in a government. But in this particular system, a directly elected public servant has been given superintendence as well as responsibility over the police force. There is no duality in the executive; the officer who heads the force is subordinate to the directly elected commissioner. This system would be effective in reducing brutalities and violations of law, to avoid any consequent public outrage. But there is no systemic and consistent commitment to adherence to rule of law. Democratic accountability is not congruent to being a legalist check;

[3] Anisha Sircar, "India's coronavirus lockdown is bringing out the worst in its police force", Quartz-India, March 28,2020
[4] Sreejiraj Eluvangal, "LOCKDOWN: Inquiry ordered against IPS officer for 'demeaning' punishment", Ultra News, March 28,2020
[5] "Can't turn a blind eye': Kerala HC takes suo motu cognisance of police excesses", TheNewsMinute, March 31,2020
[6] Section 1(6) of Police Reform and Social Responsibility Act 2011
[7] Section 2 of Police Reform and Social Responsibility Act 2011

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since a democratic leadership might fail in the face of populist urges that conflict with rule of law. There are instances where democratic governments might choose to not follow the law[8].

Judicial authorities also have the right to remedy any ill that is rendered upon any person by a law enforcement authority. This includes the powers to issue writs for violation of rights, to haul up the erring officer, as well as to impose degrees of punishment on him. This particular check, though effective, is a post facto remedy and does not entail any preventive measure. No preventive judicial control over law enforcement exists. The systems of ombudsmen also fail in this aspect, since only post facto remedies are provided. Post facto remedy in the form of a litigation is not an easy and inexpensive option; further, it usually only redresses the litigating party, without far reaching consequences.

There are other systemic preventive solutions like inclusion of cameras, procedural requirements of witnesses etc. Such means are definitely a check on the law enforcement agencies, but may be fulfilled only in letter and not in spirit. Also such a mechanism does not have a superintending force over the agency; it is merely a procedural safeguard.

2.2 Fallacies in having purely bureaucratic leadership for law enforcement agencies

As a case study, the Food Safety Commissionerate for the Kerala State is considered. This is a statutory authority for effective implementation of food safety and standards[9]. The law enforcing authority has state-wide jurisdiction and consists of two wings, Enforcement and Analytical. The Analytical wing operates the food laboratories. The Enforcement wing deals with the inquiries into the legal violations. Both the wings are headed by Joint commissioners reporting to the State Commissioner. The enforcement hierarchy entails three sub-regional Deputy Commissioners and further subordinate authorities, being Assistant Commissioners and Food Safety Officers[10]. The Food Safety Officer is vested with powers to inspect any food establishment, seize samples, investigate complaints, conduct enquiries, stop and inspect any vehicle carrying unsafe food, etc. There shall also be a designated officer and adjudicating officer to conduct inquiries and pass

[8] Page 110 , chapter 4, A postscript to "Political foundations of democracy and rule of law", Democracy and the Rule of Law, Adam Przeworski, José María Maravall, Cambridge University Press
[9] Kerala Food Safety and Standards Act, 2006 No. 34 OF 2006
[10] https://foodsafety.kerala.gov.in/enforcement-wing/

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statutory orders. An appellate tribunal has also been constituted to hear appeals against the orders[11].

The Food Safety officer is vested with the powers to conduct search and seizure, and general surveillance and investigation into the compliance to the norms by food establishments. This plenary law enforcement power of the Food safety officer is only circumscribed by internal administrative superintendence. There is wide discretion available with the officer to select cases to proceed with, and to qualitatively affect the proceedings. This discretion has led to a window of opportunity for the officers to selectively enforce the law and spawn corrupt practises. Consequent to an inspection by the apex anti-corruption body of the state government, Vigilance and Anti-Corruption Bureau, many violations and lapses were discerned. It was found that the officers were prone to bribery, to retain food samples and refrain from referring them to testing, inaction on complaints received and general lack of maintenance of statutory records[12]. These lapses are systemic and engendered due to the monolithic structure of the agency; and the same was brought to light in a post facto manner through the actions of an external agency. Procedural lapses in the conduct of inspections and seizure operations had caused the Food Safety Commissioner to direct the video recording of the proceedings[13].

2.3 Ombudsman model for post facto redressal

The ombudsman system is an ideal check for the Government to independently and fairly address and redress grievances arising out of abuse, excesses, violations, etc[14]. All models of ombudsman system are predicated on post-facto nature of the redressal without a preventive or concurrent check over the executive. The outputs of the Lokpal and lokayukta systems in India are also recommendatory, despite the agencies having wide investigative powers.

The Income Tax Ombudsman system may be considered as an example of a system that failed to act as a check to law enforcement authorities both by weakness in design as well as in imagining the scope of operations. The Income Tax Ombudsman was designed as grievance redressal

[11] Kerala Food Safety and Standards Gazette Rules 2011
[12] "VACB finds Food Safety staff-hoteliers nexus", The Hindu, December 13, 2019
[13] Shainu Mohan,"Kerala Food safety raids to be recorded", The Deccan Chronicle August 29, 2019
[14] Jeremy Pope, Chapter 10, Confronting Corruption: The Elements of a National Integrity System, TI Source Book (2000)

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mechanism for tax payers. The scope for grievances was limited to delay in issuance of refunds, non-responsiveness to tax payer communications, delays in processing of various services, etc. The grievance itself should have been submitted to the income tax authority and only on failure of consideration by such authority, could the tax payer approach the Ombudsman. The redressal or the "award" by the Ombudsman included directions to the income tax authorities for performance of obligations and a token compensation. The Ombudsman could also specifically give an adverse reference about the concerned officer to the higher executive authorities. The Income Tax Ombudsman, himself was to be a retired high-ranking officer; and himself was under the administrative superintendence of the Income Tax Department, with functional autonomy for operations[15].

The Income Tax Ombudsman system was abolished by the Union Government considering that the tax payers increasingly preferred online grievance redressal mechanisms[16]. This is true considering the limited scope and jurisdiction given to the Ombudsman. The reactions to abolition move included a call for reforming and empowering the ombudsman instead[17]. Grievances that cannot be filed online, like that of possibility of any excesses committed during the course of a search and seizure action. The Honourable High Court of Patna upheld State Human Rights Commission's order holding late night interrogation during search and seizure operations as a grave human rights violation[18]. Without going into an analysis of the possibilities and precedents for violations and excesses in revenue search and seizures, it is only sought to highlight the absence of any departmental first response authority to consider such grievances post facto, and also the absence of any concurrent check during the course of the operations. The only relief available is by invoking the plenary writ jurisdiction of the High courts. In the case of Rajendran Chingaravelu vs Mr. R K Mishra and others, the apex court remarked on the conduct of authorities during the course of cash seizure operation in the airport, by the Air Intelligence Unit. The court dismissed the petition by drawing satisfaction from the remedial measures undertaken by the department, including specifications and procedure manual like the circular for "Avoiding harassment in the

[15] The Income Tax Ombudsman Guidelines 2010, https://www.incometaxindia.gov.in/Documents/ombudsman_guidelines_2010.PDF
[16] "Cabinet approves abolition of Ombudsman for direct, indirect taxes", The Economic Times, February 6,2019
[17] Neil Borate, "Tax ombudsmen abolished: Experts raise concern", Livemint, February 18, 2019
[18] CCIT Vs. Rajendra Singh (Patna High Court) dated 02.02.2012, Civil Writ Jurisdiction Case No. 10707 of 2011

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course of enquiry/search of the air passengers by the Air Intelligence Units/Investigation Units of the Income Tax Department" for conduct of such operations in the future with minimal hassles[19].

This judicial intervention is a significant example of how the courts can and have laid down the law in terms of procedural and enforcement aspects of law. It depicts how the judicial state of mind can balance the interests of citizens with the rule of law. The Court has even moved on to mandating structural changes in law enforcement authorities to ensure the same, and this was done for police reforms, the most ubiquitous law enforcement agency in the country.

3. Police reforms through judicial pronouncement

It is imperative to consider reforms in law enforcement in light of the landmark judgement of the Supreme Court of India in the case of Prakash Singh vs Union of India[20]. The writ petition was filed by retired police officers and members of civil society. The petitioners sought urgent extraordinary relief from the Apex court for several reasons. The plea was cited in the final judgement by the apex court as that any torture or harassment or malicious prosecution in the form of abuse by people is manifested from unscrupulous political directions. It sought to enunciate that the commitment of police authorities should solely be to Rule of law.

The Apex court invoked its extraordinary powers to render complete justice, by issuing directions to the Union government and State governments to implement police reforms[21]. This judicial intervention was justified by the court citing the long pendency of reform proposals as well as the urgency in ensuring compliance of police forces to the Rule of law as enshrined by the Constitution. Though the judgement focussed on policing reforms, the underlying principles are equally applicable for any law enforcement agency.

It was pronounced that "a supervisory mechanism without scope for illegal, irregular or mala fide interference with police functions has to be devised." The judgement relied upon the deep analytical studies carried out by various committees and commissions for police reforms. The court directed for constitution of Statutory Commission in each State which shall include laying down broad policy guidelines and directions as well as forum for representation by police officers against

[19] [2009] 15 (Addl.) SCR 1113
[20] (2006) 8 SCC 1
[21] Article 142 of the Constitution of India

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any illegal orders or directions. The commission was intended as a watchdog to ensure the State police always acts according to the laws of the land. The directions of the commission were to be binding.

The proposed state security commission was to have a politico-bureaucratic structure with the political executive at head, and membership varyingly composed of leader of opposition, citizens' ombudsman or Lokayukta, Chief Secretary or Home Secretary, Head of the police force, as well as independent members. It was also suggested that a retired or sitting judge of the High Court, as nominated by the Chief Justice of the State High Court may be made member of the commission.

The judgement also called for the establishment of Police establishment board constituted by senior police officers to handle personnel matters like transfers, postings, promotions, disciplinary proceedings, etc. The recommendations of such a board were to be normally accepted by the government.

The judgement directed for the establishment of quasi-judicial ombudsmen, police complaints authorities at state and district level for redressing complaints of police excesses or misconduct. The state and district level authorities were to be headed by retired or sitting high court judge and district judge respectively. The authorities could be supplement with sufficient staff and also augmented with membership from civil society. The authorities would look into cases of misconduct causing death, rape, extortion, etc. and any other such abuse of power.

A study by the Commonwealth Human Rights Initiative revealed that the judicially mandated police reforms have only remained on paper. The state level and district level police complaint authorities which were intended to inquire into and redress complaints of serious misconduct and abuse by police authorities were not fully implemented by even one state government. A significant minority of states including the most populous Indian state Uttar Pradesh completely ignored this directive[22]. This directive had sought to introduce a quasi-judicial inquiry mechanism to replace opaque internal inquiry systems. The system was introduced by rightly diagnosing the ills; but the medicine never got administered even in minimal dosage. The post-facto nature of the remedy provided by the Police complaints authority and any ills or impediments to this system

[22] "SEVEN STEPS TO POLICE REFORM", Commonwealth Human Rights Initiative, https://www.humanrightsinitiative.org/programs/aj/police/india/initiatives/seven_steps_to_police_reform.pdf

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cannot be examined, due its absent and faulty implementation. It is even possible that the non-implementation of the judgement can be linked to the proportion of human rights violations in the state[23].

External police accountability, itself can be brought about by oversight bodies like the Police Complaint authorities, judicial remedy in the form of litigation against the individual officers concerned, and through Human Rights Commissions[24]. Police Complaint Authorities have failed because of the way they are constituted, including using incumbent officers. The litigation process against individual officers is stymied by the legal immunity provided for officers, for actions in the course of duty. The revocation of this immunity, itself requires rigorous legal scrutiny. Human rights commissions have more powers to order compensation rather than to reform or punish errant practises and officers. The recommendatory nature of their output reflects this.

It can be concluded that, a paradigm shift in approach, wherein instead of providing external scrutiny of law enforcement authorities, a model of concurrent internal scrutiny may be examined for efficacy. Such a model will complement the existing system of post facto remedies with a preventive check on the exercise of law enforcement actions itself.

4. Application of legalist superintendence within law enforcement authorities

It is commonly mused, *"quis custodiet ipsos custodes?";* as to who guards the guards. The existing checks within and without the executive of law enforcement authorities and the extent of their reform have been analysed. Systems have been designed to have plural executives to oversee law enforcement agencies, with varying composition of political, bureaucratic, judicial and other independent members. Various forms of departmental as well as external quasi-judicial authorities to redress grievances and excesses have also been devised. Further, the right of any aggrieved party to litigate against any action meted out by a law enforcement authority, in the courts also acts as a remedy and a deterrent.

[23] SHENGKUO HU, COURTENAY R. CONRAD, "Monitoring via the Courts: Judicial Oversight and Police Violence in India", 2018 Annual Meeting of the Western Political Science Association, San Francisco, CA.
[24] "Legal Accountability of the Police in India", Centre for Law and Policy Research (2013) https://clpr.org.in/wp-content/uploads/2018/09/Police-Accountability-CLPR.pdf

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Systemically, these mechanisms are seen to be flawed for two reasons. The primacy of political and bureaucratic executive in decision making exists leading to possibilities of conflicts of interest, populist urges, pressure for extraneous considerations and abuse of power, etc. Such systems cannot contribute in improving the legal compliance and are fundamentally not driven by or motivated with a commitment to rule of law. Secondly, substantive legal relief is only rendered in post-facto manner by judicial or quasi-judicial or departmental authorities. Gross violations of law might be directed against the downtrodden classes, who might not be able to mobilise sufficient resources for asymmetrical litigation against the State, particularly after being subjected to any grave illegalities. It may even otherwise be stated that, a systemic fallacy exists in the form of an absence of design of executive that has a stronger commitment to rule of law than to populist or careerist considerations.

The functions of executive in the State are multifarious and require being distinguished as such. It includes policy making and implementation, delivery of services and law enforcement. The executive is usually constituted democratically, either through a direct mandate from the people or an indirect mandate from a directly elected legislature. The administrative and public policy functions of the executive require such democratic legitimacy as well as accountability. But it is proposed to consider the law enforcement functions of the state distinctly. In theory, the role of the overarching executive is limited to providing administrative and financial support to the law enforcement agencies limit their excesses. The core functions of law enforcement are to be carried out independently, with a single minded focus on rule of law. Law enforcement agencies procedurally liaise and comply with the judiciary in this regard. It is reiterated that theoretically, functional autonomy must be guaranteed to the law enforcement agencies; since no political or extraneous consideration must impinge on the requirements of law.

A law enforcement agency is defined here, as being the corps of officers and officials legally charged with the duty of enforcing a law impartially and justly across the State. Such an agency is usually vested with powers to carry out arrests, search and seizure operations, summons and impounding, etc. The exercises of these powers are antagonistic to the civil liberties that are enjoyed by the citizenry. Hence it is required that the law enforcement agencies act in a precise manner, in full compliance with the procedures and values as entailed by Rule of law. The primacy to rule of law is reiterated to signify that the agencies are by their own nature prone to being abused

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and misused for political or other extraneous considerations. The wide discretion that might be enjoyed by the law enforcement authorities, and consequent application, misapplication or non-application of laws will have far reaching consequences. Hence, the requirement of oversight over law enforcement agencies is higher than that required for other functions in the executive. Damages caused by ministerial overreach or a bad policy might be redressed by a tort suit or other such legal remedies; but the damages caused due to abuse of power by law enforcement authority would be more calamitous, and even further, violations of law by law enforcement authorities themselves will strike at the bed rock of the legalist state. Hence, law enforcement authorities need to be granted highest functional autonomy and independence from external pressures; and their management needs to be set to a higher benchmark than the other branches within the Executive.

It is hence recommended that there needs to be a systemic legalist check in the form of a preventive framework within the law enforcement authorities. A remedy for curing the ills of law enforcement agencies can be sought by restructuring the constitutive administrative law. It is intended that instead of post facto judicial and administrative remedies, a concurrent solution in the form of preventive management is established to redress this problem. This paper seeks to propose legalist superintendence of law enforcement authorities to resolve this. Legalist superintendence entails the management or supervision by an authority committed to adherence to rule of law. Such a superintendent will have concurrent position in the executive and will act in the interests of ensuring legalism of actions. This seeks to dilute the strict compartmentalisation between the executive and judiciary. The judiciary will continue to be insulated from the executive. But, it is proposed that members of the judiciary be allowed to serve in an executive capacity.

A law enforcement agency cannot be fully managed by an executive who is from a purely judicial background; there are skills and qualities that are required from an executive who has served as an officer within that cadre itself. It is hence suggested to create a concurrent quasi-judicial check within a law enforcement agency to ensure consistent and robust adherence to the rule of law. Such a check ideally requires a judicial officer to concurrently manage the agency. Reliance can be placed on the commitment of judges on the rule of law, lack of bias and independence to ensure

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that legal duties and responsibilities are fulfilled and that no excesses or illegalities are perpetrated. Competence of judges can arise from their high sense of professional honour[25].

The judiciary is a key independent pillar of the state[26].The design of judiciary in the form of a cadre of public servants who are erudite in the knowledge and application of law, with a stable and independent tenure, with the mandate of adjudication of litigations, is a unique pillar of the modern state. Such a cadre can be axiomatically held to be committed to the doctrine of rule of law by the mere force of their vocation. The exercise of judicial power does not exist on democratic legitimacy or bureaucratic seniority; but on rationality and adherence to law.

The function exercised by a judicial officer in a superintending capacity will not be that of a judicial nature; it does not entail discretion as required for interpretation of law. Rather, it entails the management skills of a judicial officer for ensuring legalism i.e., strict adherence to the rule of law. The same principle is applied when positions in various watch-dog organisations and authorities like the Human Rights Commission, Citizen Ombudsmen (Lokpal/Lokayukta), Police Complaint Authorities, etc. are mandatorily reserved for retired or serving judicial officers. More than half of the post retirement positions taken by the judges of the Supreme Court of India are posts statutorily reserved for them[27].

The function of a court is to interpret and apply the law; this is a function that is distinct and distinguishable from that of law enforcement. It is not presupposed that a court is well equipped to handle an eminently executive function; rather, it is sought to use the judicial standing and experience of the judge to act as a superintendent for the execution of law as well.

Legalist superintendence seeks to complement the post facto system of seeking legal punitive action or administrative remedies or tort damages with a system that concurrently prevents violations of rule of law through the presence of a co-equal legalist in the executive leadership.

The existing role of the judiciary is primarily in the form of judicial review of administrative actions, legislations, etc.; where any act of the executive or legislature that is ultra vires is

[25] Harold J. Laski, "An Introduction to Politcs – The Organization of the State" (1925)
[26] Nora Hedling, Markus Böckenförde, Winluck Wahiu, "A Practical Guide to Constitution Building: The Design of the Judicial Branch", International Institute for Democracy and Electoral Assistance (2011)
[27] Law in numbers – Evidence-based approaches to legal reform, Vidhi Centre for Legal Policy(2016) https://vidhilegalpolicy.in/2016/12/02/2016-12-2-law-in-numbers-evidence-based-approaches-to-legal-reform/

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invalidated. Judicial discretion is exercised while interpreting laws and ensuring the legality of executive actions. The doctrine of judicial review does entail the exercise of supervisory jurisdiction over the actions of the legislature and the executive.

The separation of executive and judiciary is considered a cardinal principle of a modern state. It is designed to insulate the latter from the former. Any extraneous influence from the executive towards the judiciary might lead to miscarriage of justice or misapplication of law. Nonetheless, the proposed legalist superintendence violates the principle of separation of executive and judiciary in n inverse manner; where the judiciary extends to executive. This is a valid lacuna; but, it is precisely the skills that are developed by and within a judicial office, that are sought to be imported to the executive of law enforcement agency to ensure legalism. Hence to insulate the judiciary from the executive; it must be mandatorily ensured that judicial officers who have served in executive capacity are not repatriated back as judicial authorities, to avoid any possible conflict of interest in possible litigations. This can be ensured by providing stable tenures for judicial officers serving in executive capacity or by tapping the pool of experienced retired judicial officers for functioning as legalist superintendents.

It may also be reiterated that legalist superintendence only complements judicial review. It is solely intended as a precautionary and preventive legalist check. It does not in any way erode the justiciability of the actions of the law enforcement authorities. The rights of the citizens to approach a court of law will remain un-impinged despite the presence of a superintending legalist over the impugned actions.

It may be argued that even judicial officers who are absorbed into the executive might eventually be susceptible to any fallacies that might cause lapses in adherence to rule of law. This premise is correct to the extent that all persons are fallible, and maybe more so in positions of power. But it is necessary to devise systems that are of a robust design. It is the judicial experience and standing of the officer that makes him fit to hold office as a superintendent in charge of upholding the tenets of rule of law. The factors that girded to ensure judicial independence are to be applied in the scenario of executive superintendence as well. Nonetheless, it is the same faith that is held on to courts of law as the ultimate guarantors for rule of law.

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The law enforcement agencies, at large, are not being brushed aside as constantly being in violation of law, in all proceedings. Rather, it is sought to highlight the absence of a legalist check within the agency, and the reliance on external judiciary, solely for post facto relief. It is being explored as to whether the sanctity of rule of law can be better addressed by providing for a concurrent legalist executive.

The premise of legalist superintendence rests on the integrity and un-impeachability of judicial officers. It can be surmised that they are also prone to be fallible or even corrupt. Even otherwise, in an executive role, such officers may be co-opted into the prevalent practises within the law enforcement agency. The possibility of individual lapses does remain, but the inclusion of a judicial officer will definitely not aggravate any lapses in law enforcement; but only check it. It is crucial to ensure the fitness of judicial officers being drawn into law enforcement. It must be noted that the presence of a superintending judicial officer does not limit or abate the overarching jurisdiction of administrative and judicial platforms to redress any consequent violations as well. It is only proposed that judicial officers who are competent and experienced in upholding the rule of law be infused into and as enforcement authorities to impart a rigorous check to proceedings.

The appointment of judicial officers into executive offices might also be construed to affect the high dignity of judiciary and impinge on judicial independence. This fallacy holds true for all the post-retirement appointments that are reserved and meted out to judges. It was even reasoned that the independence of the judiciary was more significant than the need to have judicial members presiding over tribunals and commissions[28]. The remedy for such a fallacy is not in excluding judicial officers from all positions and gilding them reclusively. Rather, their wide judicial experience must be tapped for the benefit of the governance system at large. The policy of appointments must be insulated from the pressures of the political executive and must be performed by an independent body, akin to the Public Service Commission or Judicial collegium to ensure paramountcy of merit and perpetuation of judicial independence.

[28] 14th Report of the Law Commission of India

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Hence, the systemic flaw in designing a bureaucratic law enforcement authority, can be balanced by including an independent judicial officer in the leadership to act as a complementary guardian of the principles of rule of law.

5. Diarchic directorate to head law enforcement agencies

Provisioning of legalist superintendence can only aim for a heightened adherence to rule of law; it cannot on its own bring in the agility, efficiency and skills required for the effective and sustained management of a law enforcement agency. In order to adopt legalist superintendence in the management, it is proposed to have a diarchic directorate as the executive of a law enforcement agency. Such a directorate would consist of two co-equal directors, being Director (Enforcement) and Director (Law). Director (Enforcement) will be akin to the presently existing agency executive, an officer from within the cadre of the agency. Director (Law) will be serving or retired high-ranking judicial officer. A judicial officer after serving in an executive capacity cannot be repatriated to the judicial cadre, owing to possible conflicts of interests in adjudication thereafter. The Director (Law) may be selected from retired judicial officers to ameliorate this issue. It is an established precedent that retired judicial officers continue to hold positions in various watch dogs of the State[29]. The Director (Law) will be empowered with concurrent executive powers, and will be vested with the rank, powers and privileges akin to the agency executive, or the Director (Enforcement). It shall be the cardinal duty of the Director (Law) to ensure that the law enforcement agency adheres to the rule of law. In order to ensure the same, the Director (Law) should be vested with co-equal inspecting and disciplinary powers over the agency. The Director (Law) will be in exclusive and full-time service to the management of the agency. Hence, as a co-equally committed public servant, the Director (Law) can be privy to any of the confidential or secretive matters of the agency, as well.

A diarchic executive is proposed, instead of a more plural collegial executive to ensure that agile and effective leadership is provided to the law enforcement corps. Distinction is to be drawn with the State security commission, considered earlier, which is a plural body that provides only broad oversight to the law enforcement agency. Legalist superintendence is intended as an executive function, which will operate in a concurrent manner within and at the head of the agency. The

[29] Section 3 of THE KERALA LOK AYUKTA ACT, 1999 (Act 8 of 1999 as amended by Act 2 of 2000)

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balancing of executive with a legalist authority is being considered apt and adequate; rather than expand to a more unwieldy triumvirate or plural executive.

The historic Roman Republic is unique in the annals of civilisation for having tried a novel political structure with diarchic leadership, which entailed a consulate consisting of two co-equal consuls leading the executive concurrently. The intention behind advocating the diarchic leadership was to prevent abuse of power by vesting all the executive power in a single person. Both the consuls had the power to veto each other's decisions. The consuls wielded wide executive and judicial powers in the republic. An appeal against the sentence or decision of one consul could be brought to the other consul. The consuls would be elected together for a fixed tenure and alternately held power each month[30]. The modus for abuse prevention as adopted by the ancient Roman constitutionalists was to dissect the executive leadership and provide a mutual check therein. Nonetheless, the system produced identical and equal persons as consuls, while the system proposed in this paper seeks to balance the conventional executive leadership with a legalist check to counter balance and prevent any possibility of abuse of rule of law.

The management of day to day affairs of the agency would require procedural clarity in the operation of the diarchic executive. This may entail the requirement of concurrence and counter-signature by the Director (Law) for the decisions of Director (Enforcement). It may be clarified that both the directors are co-equals and are not accountable to each other. Rather they may be made jointly responsible for the functions of the agency and accountable collectively to the higher executive authority. The mechanism for resolution of deadlocks among the directors may also involve referral to such a higher authority along with the vesting of the right to such appeal or referral with both the directors, equally.

The tribunals structured in India for adjudication of specific matters pertaining to administrative law, tax law, etc. are structured in a diarchic manner. The Administrative Tribunal is constituted with an Administrative Member and Judicial Member with administrative and judicial experience respectively[31]. The intention behind such constitution would be to ensure that the adjudication co-

[30] Forsythe, Gary (2005). A Critical History of Early Rome: From Prehistory to the First Punic War. University of California Press.. ISBN 0520226518.Chapter 6 – The Beginning of the Roman Republic – Page 150 – The Nature and Origin of the Consulship
[31] The Administrative Tribunals Act, 1985 (13 of 1985)

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opts a holistic approach to the subject matter. Nonetheless, the final decision of tribunal requires unanimity in approach of both the members, albeit being drawn from disparate backgrounds. An equal difference in opinion is referred to another member or chairman for final resolution. It may be noted that this model of diarchic operation is only in the judicial process and not in the nature of executive management of an organisation.

The diarchic directorate consisting of the administrator and the judicial officer will be infused into the day to day functioning of the agency. The legal experience of the Director (Law) will serve the interests of the agency at large. Hence, even at the times of emergency, it is expected that the directors will be able to function together in a seamless manner. Nonetheless, specific and limited exceptions may be carved out wherein Director (Enforcement) may unilaterally initiate an action, but subject to the immediate and consequent approval by the Director (Law). Since law enforcement agencies are infused with discipline and respect for hierarchy, a judicial officer holding office as Director (Law) will be given strict and congruent respect and responsibility within the agency. The concurrent presence of Director (Law) within the agency with the executive power will act as a persistent check for any violations to the letter as well as spirit of law.

A fundamental drawback in having a diarchic executive is the possibility for perennial deadlocks. Since the Director (Law) will be an eminent judicial officer, with deep knowledge of law it is naturally not expected that he will be irrationally antagonistic to the Director (Enforcement). Similarly, an antagonistic attitude is not expected from the Director (Enforcement) as well, since he is an experienced law enforcement authority. The proposed solution for deadlocks is to refer the same to the higher authority for resolution. As an alternative, one of the directors may be generally or specifically empowered to resolve the issues, subject to drawing a clear and substantive satisfaction to the same. This may be particularly considered with respect to allocation of purely administrative responsibilities and powers to the Director (Enforcement).The Director (Law) is not intended as a fault-finder within the agency, rather he is in a co-equal executive position with the corresponding responsibility for the outcome and performance of the agency.

The proposed diarchy is intended only at the level of the agency executive, though a hierarchy of such diarchic directorial executive positions may be envisaged, based on the context and nature of operations within the law enforcement agency. But such a system must not exist as parallel

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machinery; the accountability and responsibility of both directors must be common and always established collectively; i.e., there should not be an independent wing of judicial officers within the agency.

The concurrent executive powers of the directors might also create conflicts relating to personnel policy, like that of transfers and posting, disciplinary action, etc. It is of course the intention of the system of diarchy to create constructive conflicts so that the rule of law is upheld. After any hiatus at the initial stage of implementation, the working of the agency is expected to be smooth through the placement of experienced officers in the system of diarchy The Director (Law) must have equal powers in personnel matters as well, since the same is crucial to ensuring the deterrent effect that such a juridical superintendent might have. The prescient invocation of disciplinary powers by the authority would act as a more alive motivation to ensure adherence to the rule of law than a post facto stricture from an external judicial authority. In all executive agencies, it is the supervisory disciplinary powers of the leadership, that deters any violations; and it is precisely for that reason that, the same power is sought to be extended in a concurrent manner to a legalist authority to preventively ensure that violations of rule of law by law enforcement officers are curbed. Plenary powers to inspect and review the functioning of the law enforcement authorities are also to be vested in the Director (Law) for the same purposes.

It is required to ascertain the impact on the efficiency and performance of the agency as a consequence to the shift from the system of having a singular head of the force. External checks in the forms of judiciary, ombudsmen continue to exist and monitor the functioning of law enforcement agencies. It cannot be construed that the existence of such entities impinges on the efficiency of the agency. Further, the metric of efficiency in the case of a law enforcement authority cannot be reduced only to a statistic of convictions, prosecutions and prevention of violations; rather it must also be held to the standard of ensuring strict adherence to law, while enforcing law itself. The internalising of the legalist check within the leadership of the organisation might undoubtedly cause structural decision conflicts; but it is exactly in this constructive friction of leadership that the effective check can be said to be laid.

The procedure for appointment of directors must be impartial and independent with a stern focus on merit and experience. Such a process can be done by public service commission in consultation

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with the political executive, with a supplementary consultation with the higher judiciary for the selection of Director (Law).The directors need to be provided with a fixed and stable tenure. The removal of directors must also involve an independent process, preferably a judicial enquiry where the director is presented an opportunity to be heard. The persistence of unreasonable or irrational deadlocks can suffice to cause curtailment of tenure and early dismissal. Hence, as a rule of procedure, the functioning of both the directors must be a matter of record, susceptible to be examined later. A stable and secure tenure and service conditions are essential to ensure that the independence that brings about judicial excellence is reproduced in the performance of the legalist performing superintending duties. It should also insulate the agency from external pressures.

Hence, it is possible to conceive and imagine a model for diarchic leadership for law enforcement authorities to balance and ensure strict adherence to the tenets of law. The existence of a judicial officer as concurrent autonomous executive may cause teething troubles, including possible gridlock in leadership; but can be expected to act constructively as a legalist check within the system to prevent violations and excesses.

5. Conclusion

The idea behind this paper is to reverse the traditional notion of having a single officer heading a law enforcement agency. The introduction of a check in the form of a co-equal juridical superintendent is expected to improve the functioning of the agency through the general and specific experience of that officer; and more importantly, ensure a strict adherence to rule of law in the day to day functioning of the law enforcement agency. This proposal intends to pre-empt and prevent a post facto judicial solution by devising concurrent legal machinery with executive powers to supervise the agency. It is surmised that a diarchy might lead to deadlocks and practical difficulties in the field level, but an experienced pair of an administrator and a jurist might be able to act as a complementary duo as well. The judicial check that is proposed needs to be balanced with efficient solutions for deadlock avoidance and resolution, without impinging on judicial independence. This model rests on the premise of law enforcement authorities gravitating away from the executive pillar of the state towards the independent judicial pillar.