

# **Bihar's Anti-Alcohol Policy – Proportionality Gone for A Toss?**

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## **1. Introduction**

The Bihar Prohibition and Excise Act, 2016 has directly resulted in the imprisonment and forfeiture of property for almost a million people in the state over the past seven years. This law empowers authorities to strip individuals of their freedom, demolish their residences and belongings, and seize their private vehicles if they are discovered with alcohol within the state's jurisdiction. These consequences are undeniably alarming.

The alcohol ban became one of the major campaign promises in the Bihar assembly elections of 2015. The ruling party promised to implement a complete ban on the consumption and manufacture of all kinds of intoxicants in the state if they were re-elected. The government believed that alcohol and intoxicants led to a significant increase in domestic violence, and women who were victims of such violence were concerned not only for themselves, but also for their families and children. After the government was re-elected, they imposed a complete prohibition on the consumption and manufacture of intoxicants in Bihar, drawing authority from Article 47 of the Indian Constitution, which directs the state to strive to prohibit the consumption of intoxicating drinks and drugs that are harmful to health. The ban received widespread support among the voting population, further strengthening the government's determination to enforce the prohibition effectively.

Once the legislation was put into effect, it came under heavy scrutiny from concerned stakeholders. The Patna High Court initially struck down the legislation entirely, citing its unconstitutionality due to being considered highly arbitrary and disproportionate. Chief Justice Ansari, while holding the legislation unconstitutional, stated that "reasonable restrictions on alcohol consumption, or even complete prohibition, can be imposed by the state to uphold the goals set by the Constitution in the form of Directive Principles of State Policy. However, such policy implementation should be in accordance with the law and not in violation thereof" (Singh, 2016). Nevertheless, the Supreme Court of India stayed the Patna High Court's judgment. The division bench of the Supreme Court, comprising Justice Dipak Misra and Justice

U.U. Lalit, opined that "a ban on liquor and fundamental rights do not go together" and quashed the high court's order that held the legislation as ultra vires the Constitution (PTI, 2016).

The Patna High Court had reminded the government of constitutional values and directed it to consider these values when formulating alternative legislation in the future, while quashing the Act. However, the government ignored this direction. Not only did the government fail to comply with the court's directions, but it also enacted even stricter laws later, disregarding the boundaries of contemporary criminal laws. Section 30 of the Bihar Prohibition and Excise Act, 2016 states that "Whoever, in contravention of provision of this ... - (a) manufactures, possesses, buys, sells, distributes, collects, bottles, imports, exports, transports or removes any intoxicant or liquor" shall be punished with imprisonment for a term which may extend to life and with fine which may extend to ten lakh rupees. The provision further states that punishment for first-time offenders shall not be less than five years, while for subsequent offenses, it shall not be less than ten years of rigorous imprisonment along with a fine of not less than five lakh rupees.

Furthermore, in section 32 of the Act, the idea of 'possession' of such intoxicants or liquor has been kept in a way that leads to the reversal of the burden of proof. It narrates that people found with such contrabands in possession have to account for those and "in the event of failure to offer a satisfactory explanation", it shall be a presumed by law that the accused person is guilty of the offence, unless one is able to prove otherwise. The Act includes the death penalty as a punishment under section 34 for mixing noxious substances with alcohol. Additionally, all penal provisions of the Act carry mandatory minimum punishments, leaving no room for the judicial authority to consider mitigating factors when sentencing individuals. The practice of imprisoning people for a minimum of 5 to 8 years is observed as the lower threshold set by the government. Moreover, hefty fines extending to lakhs of rupees are mandatory for offenders under different provisions of the Act.

After reviewing the legislation in question, one might have serious concerns about the various provisions outlined in it. The provisions not only appear to be highly disproportionate, but also seem to have overlooked significant criminal law principles such as the presumption of innocence, reversal of the burden of proof, non-conformity with the provisions for arrest, search, and seizure of property, and arrest regulations concerning women, as stipulated in the Bhartiya Nagarik Suraksha Sanhita, 2023.

According to the data provided by the government in the state assembly from April 1, 2016 to 20<sup>th</sup> February, 2023, total of 7.49 lakh people have been incarcerated under the Bihar Prohibition and Excise Act, 2016 (Roy, 2023). The data suggests that almost 274 people are getting incarcerated on a daily basis due to alcohol-related offenses within the jurisdiction. The government further informed that conviction rate under the particular head remains 21.98% during the mentioned period of time.

Upon closer examination of the legislation, we can affirm that the government has decided to use deterrence technique in order to mend the citizenry within the jurisdiction. Deterrence as a concept is enshrined under Retributive nature of proportionality where the law treats an individual as a separate being of value within society and put the sanctions accordingly. Retributive proportionality takes into consideration the past history of the accused.

According to Goh (2013) retributive proportionality takes shape in two distinct ways. Initially, through 'defining retributivism,' where the punishment is tailored precisely to match the severity of the offense, thereby leaving no scope for other objectives in punishment. In this approach, the doctrine guides the sentencing judge to design a punishment that aligns proportionately with the intended outcome of retribution. Alternatively, 'limiting retributivism' allows for the consideration of additional sentencing objectives, while still setting retributive boundaries. Here, the sentencing accommodates various aims of punishment, such as societal deterrence and condemnation, within the confines of retribution's principles. The legislation is the classic example of 'limiting retribution' as the sentencing objective comprises of abovementioned additional goals.

## **2. Bihar Prohibition and Excise Act, 2016**

The examination the Bihar liquor law and its adherence to notions of proportionality is of utmost importance. The particular decision on the part of the government proved to be a popular stunt, rather than an efficiently articulated concept. The Act under section 13 lays down that no person shall manufacture, bottle, distribute, transport, collect, store, possess, purchase, sell or consume any intoxicant or liquor. Hence, the ban seems complete and overarching in terms of any form of ancillary activities surrounding different form of intoxicants or liquor. The definition of intoxicant is also kept comprehensive [Bihar Prohibition and Excise Act, 2016, S.2(40 and 41)] includes

other substitutes of alcohol and drugs, which are generally dealt under the provisions of Narcotics and Psychotropic Substances Act (NDPS), 1985.

Along with inter-jurisdictional clashes with other Act, the legislation lays down provisions which prima facie contradicts fundamental principles of criminal law. Let's look into certain provisions of the Act thematically in order to comprehend existing legislative lacunae.

It has been laid down that whoever found with contrabands in possession have to account for those and “in the event of a failure to offer a satisfactory explanation”, it shall be presumed by law that the accused person is guilty of the offence, unless one is able to prove otherwise [Bihar Prohibition and Excise Act, 2016, S. 32(2)]. The fundamental principle of “presumption of innocence” has been sidelined under the provision which is proving detrimental for the accused under this Act. The idea of ‘possession’ of such intoxicants or liquor has been kept in a way which leads to ‘reversal of burden of proof’. It is pertinent to note that a person who fails to prove his or her innocence will be incarcerated for years to come. The High Court while striking down the legislation at the first instance had correctly opined that “This provision reverses the criminal jurisprudence of prosecution having the liability to prove the guilt beyond reasonable doubt. Here, a person is presumed to be guilty unless he proves to the contrary. The presumption of innocence is totally taken away and the burden of proof thereof is put on the accused....For any reason, if he fails to prove his innocence, he would straightway be liable to punishment, which would be of minimum 10 years imprisonment with astronomical fine and would lose his entire property by virtue of confiscation and the Courts are rendered helpless in the matter even though there may be mitigating circumstances” (*Confederation of Indian Alcoholic Beverage Companies v. State of Bihar*, 2016).

Another principle that the Act is actively violating is the provisions of arrest mentioned under *Bhartiya Nagarik Suraksha Sanhita*, 2023 as well as strict guidelines laid down by apex court previously. The impugned law fails to take into consideration Section 39 (3) of the *Bhartiya Nagarik Suraksha Sanhita*, 2023, which mandates that the police officer shall, in all cases where the arrest of a person is not required, issue a notice directing the person against whom a reasonable complaint has been made, to appear before him at specified time and place. The apex court in the same context held in the landmark judgment of *Arnesh Kumar v. State of Bihar*, that notice of appearance in terms of Section 41A of Cr. PC (now 39(3) of BNSS) be served on the

accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing (*Arnesh Kumar V. State of Bihar, 2014*). The provision also discards the rule of basic decorum and propriety as laid down in Section 43(5) of *Bhartiya Nagarik Suraksha Sanhita, 2023* where it is expressly mentioned that “no woman shall be arrested after sunset and before sunrise, ...”.

Furthermore, the provisions regulating search and seizure under the Bihar anti-liquor law also has ignored procedure laid down under principle criminal procedure code of India. The provision under the impugned law states that a designated official may, without warrant but subject to such restrictions as may be prescribed by the State Government, enter, inspect, search any place at any time, day or night, and seize any document, sample, equipment, conveyance, animal, commodity, intoxicant, material, raw material or any other item of concern (S. 73, Bihar Prohibition and Excise Act, 2016). Whereas, the section 185 of *Bhartiya Nagarik Suraksha Sanhita, 2023*, requires the officer conducting search to record in writing the reasons for doing so without warrant, and sending a report forthwith to the Magistrate.

Bihar Prohibition and Excise Act, 2016, further need critical analysis on the ground of severity of the punishment. The Government has chosen to control the habits of the general populace through a strict approach, which employs the highest level of deterrence to discourage such deviant behavior, ultimately leading to severe consequences. The Act's provisions for incarcerating individuals for various offenses, which generally range from five years to life imprisonment and even death, fails to align with both the fundamental principles of criminal jurisprudence and legal frameworks of a modern liberal democracy. It is interesting to note that section 53 of the impugned legislation states that “if any person, after having been previously convicted of an offence punishable under this Act, subsequently commits and is convicted of an offence under this Act, he shall be liable to twice the punishment, provided for the first conviction”. Introduction of provision of such nature, even after already existing severe punishment depicts too much belief of the government in deterring the population.

There are certain activities in the society which are deemed wrong or deviant, but they do not carry such degree of social disapprobation as to necessitate the use of penal laws. Consumption of alcohol, smoking etc. fall under this category- they are generally frowned upon by society as deviant or morally wrong, but do not stand on

such degree of disapproval as other violent crimes. Thus, attaching the same degree of seriousness to such regulatory offences may undermine the efficacy of social disapproval attached to several other heinous offences (Langbein, 1974).

As commented by the Chief Justice of the Patna High Court primarily on the initial legislation (*Confederation of Indian Alcoholic Beverage Companies v. State of Bihar*, 2016):

“The submission is that though the legislature has the right to provide for punishments for contravention of provisions of Acts made by the legislature, the procedure and the punishment has to be fair and not draconian, for, that would be violative of Article 21 of the Constitution. The punishment cannot be disproportionate to the offence. ...it is submitted that virtually, the punishment for any offence has been prescribed as not less than ten years, which may extend to imprisonment for life and with fine, which shall not be less than Rs. one lakh, but may extend to Rs. ten lakhs. ... it is highly disproportionate and can be termed as draconian”.

The various flaws of the Act, hastily passed in flagrant violation of fundamental principles of criminal laws, have resulted in repeated amendments over the past few years. Since the legislation got its shape, the law has undergone two major amendments (Bihar Prohibition & Excise (Amendment) Act, 2018 and Bihar Prohibition & Excise (Amendment) Act, 2022), along with further changes done through the Bihar Excise and Prohibition Rules (The Bihar Prohibition and Excise Rules, 2021, and Notification no - 2458 Amendment of Bihar Prohibition and Excise Rules, 2021), which have also been amended in order to mitigate the severity and disproportionality of the penal provisions and for introduction of fairness in procedures. These amendments are substantive proof that the legislation has been of excessively harsh nature and persistently failing to serve any legitimate purpose.

The author would like to emphasize that the legislation should be perceived in a different manner. The law criminalizes an activity which is ‘self-harming’, rather than ‘harm to other’. Hence, the essence of application of retributive proportionality jurisprudence does not seem well articulated or justified in this scenario. But the legislators in this instance have not shied away from applying retributive principles in self-harm category of offence.

### **3. Proportionality in Punishment- A paradox**

The doctrine of proportionality is one of the most discussed principles since a long period of time. In spite of such lengthy deliberation through time by leading pioneers, the principle could not be settled and there remains a constant sense of confusion with its application in the contemporary sense (Goh, 2013). Goh (2013) makes an attempt to list out certain deficiencies with the doctrine such as vagueness in definition and theories of proportionality, failure of observance of the sentencing goals, inherent difference between the concept of crime and punishment and treatment of the doctrine of proportionality, causality of approach whereby it takes the shape of opinions and sentimental values. Despite the concept having major deficiencies, it has comprehensive application in legislation and sentencing cannot be diluted or ignored.

If we attempt to find relation of the impugned legislation in the context of utilitarian concept of proportionality, it fails to fit the context. According to utilitarianism, punishment itself is considered evil until it is utmost necessary. Utilitarian proportionality is futuristic, where sentencing goals or purpose is weighed against proportionality, such as imposition of deterrence, cost of rehabilitation, and cost to society (Frase, 2005). Bentham's idea of punishment was based on his self-developed principle of utility where societal measures would be judged based upon the aggregate satisfaction derived from it (Bentham, 1982). Bentham perceived punishment itself as evil as it brings discomfort and dissatisfaction among those who are subjected to it. According to this view, punishment can only be inflicted and warranted if it derives or produces satisfaction to a relatively greater degree (Hirsch, 1992). But the impugned legislation has intended to use punishment as a weapon with a presumption that severe the punishment be, achievement of compliance gets much smoother.

On the other hand, upon a closer look legislation does have characteristics of retributive form of proportionality as it is treating individual as a being of value and not as a collective being. Retributive proportionality considers the past history of the accused and believes that the doctrine is nothing but means to the goal of retribution, by calculating the sentence based on individual's guilt or blameworthiness (Frase, 2005). The infliction of punishment is done in order to match the severity of the offense as well as certain additional objectives such as stigmatization, deterrence etc. Kant made it simpler by stating that accused's liability will largely depend on his own

actions rather than on the punishment's collective societal benefits. The excise policy at hand seems to be in conformity with 'limiting retributivism' where the law is ensuring deterrence as well as condemnation of alcohol consumption at societal level.

Bihar's excise policy, which is central theme of the paper, has successfully busted all the normative principles of proportionality. In spite of declaration of the legislation as unconstitutional, prima facie on the ground of being draconian and disproportional, the government instead of revisiting the provisions, chose to legislate with a sense of reprisal. That led to inclusion of such provisions in the law which may apparently be felt as unjustified. The imposition of stern punishments, reversal of burden of proof, penalization of consumption, powers of indiscriminate arrest and search etc. is nothing short of disturbing. The provisions containing high mandatory minimum punishments have deprived judges of their powers to fix a lower minimum sentence based on facts and circumstances of a particular case. This ignites a thought among normal populace as well as scholars about liberty being at stake.

The legislation is nothing but a bunch of provisions based on medieval belief that higher punishments ensure crime control as it generates a fear amongst the populace. The particular presumption has no evidentiary theoretical foundation. In fact, statistics reveal that while arrests, search and seizure have increased, as also incarcerations under the law, Bihar continues to experience high rates of liquor law violations (Roy, 2023). Furthermore, the legislation was predominantly enacted to tackle the menace of domestic violence prevailing in the state. But even that scenario has not undergone any change (Rumi, 2022). Thus, the law seems to be failing in its basic objective and it also defies the fundamental doctrine of proportionality, thereby generating a situation of confusion, distrust and legislative ambivalence.

Criminal law was devised as a weapon to keep society intact, peaceful and regulated. Excessive use of such weapon specially in such disproportional manner might lead to diminishing stature of the law itself, which should be in our opinion much bigger concern for the state as well as the civil society. Hence, proportionality, in whichever form is applicable, must not be ignored, either by different legislatures or sentencers, and efforts must be directed towards making the doctrine more robust for application purposes in future course of time.

#### **4. Conclusion**



The paper is divided into six separate sections. The first part provides background information and a general introduction to the legislation being discussed. The second part examines existing doctrines of proportionality, namely Utilitarian proportionality and Retributive proportionality. It also addresses the conflict between these two doctrines and proposes ways to reconcile them for application in modern times. The third part extensively discusses the implementation of the principle of proportionality in the legislative context and for sentencing purposes, both globally and in India. The fourth section objectively analyzes the application of the proportionality principle in the Indian context, highlighting the differences in meaning and application compared to the Western context. The fifth segment discusses the controversial Bihar Excise policy, emphasizing instances of disproportionality in the legislation and the nature of proportionality applied in this specific case. The sixth segment of the paper comprises of conclusion and recommendation for the enhanced policy roadmap, which could reduce friction between state and the citizen. Furthermore, the legal analysis of the legislation would help us trace belligerent violations of the already established legal principles under criminal law.

The research would help us to comprehensively understand the intention of the legislature while passing such legislation. The analysis of the law further would help us highlight the lacuna and unnecessary severity enshrined under the Act.

### **List of References**

Arnesh Kumar V. State of Bihar (2014) 8 SCC 273

Beccaria, C., Newman, G., & Marongiu, P. (2017). On crimes and punishments. In *Routledge eBooks*. <https://doi.org/10.4324/9781315125527>

Bentham, J. (1982). *An Introduction to the Principles of Morals and Legislation*, edited by J. H. Burns and H. L. A. Hart. London: Methuen. (Originally published in 1780)-  
<http://dx.doi.org/10.1093/oseo/instance.00077240>

Clawson, M. A., & Fahey, D. M. (1998). Temperance and Racism: John Bull, Johnny Reb, and the Good Templars. *The American Historical Review*, 103(3), 979. <https://doi.org/10.2307/2650720>

Frase, R. S. (2005). Excessive prison sentences, punishment goals, and the Eighth Amendment: “Proportionality” relative to what? *Minnesota Law Review*, 89(3), 571–651. <https://experts.umn.edu/en/publications/excessive-prison-sentences-punishment-goals-and-the-eighth-amendm>

Goh, J. (2013). Proportionality An Unattainable Ideal in the Criminal Justice System. *Manchester Review of Law, Crime and Ethics*, 2, 41-72. [MSLR Vol2 4\(Goh\).pdf \(manchester.ac.uk\)](https://www.manchester.ac.uk/mslr/vol2/4(Goh).pdf)

Huigens, Kyron. (2000). Rethinking the penalty phase, *Arizona State Law Journal*, 32(4), 1195-1282- <https://larc.cardozo.yu.edu/faculty-articles/275>

Indian Alcoholic Beverage companies v. State of Bihar 2016 SCC online Pat 4806 <https://www.scconline.com/blog/post/tag/bihar-liquor-ban/>

Kant, I. (1964). *Groundwork of the Metaphysics of Morals*, translated by H. J. Paton. New York: Harper Torch books. (Originally published 1797.)- <https://doi.org/10.1017/CBO9780511809538>

Press Trust of India. (2016, October 7<sup>th</sup>) Supreme Court stays Patna High Court order quashing Bihar liquor ban law, *The Indian Express*. <https://indianexpress.com/article/india/india-news-india/supreme-court-stays-patna-high-court-order-quashing-bihar-liquor-ban-law-3070309/>

Ristroph, A. (2005). Proportionality as a Principle of Limited Government. *Duke Law Journal*, 55(2), 263–331. <http://www.jstor.org/stable/40040462>

Roy, A. G. (2023, March 23). 7.49k people arrested under liquor prohibition law in Bihar: Excise minister. *Hindustan Times*. <https://www.hindustantimes.com/cities/patna-news/749k-people-arrested-under-liquor-prohibition-law-in-bihar-excise-minister101679565984976.html>

Rumi, F. (2022, May 9). Bihar: 83% women face violence when hubbies get drunk. *The Times of India*. <https://timesofindia.indiatimes.com/city/patna/83-women-face-violence-when-hubbies-get-drunk/articleshow/91426156.cms>

Singh, R. K. (2022, April 5). Now, Bihar's liquor fine for first-time offenders reduced to Rs 2,000-5,000. *India Today*. <https://www.indiatoday.in/india/story/bihar-liquor-ban-fine-first-time-offenders-reduced-prohibition-1933576-2022-04-05>

Singh, S, (2016,Oct 1<sup>st</sup>), Patna High Court strikes down Nitish Kumar's total prohibition plan, terms it illegal, *The Economic times*.<https://economictimes.indiatimes.com/news/politics-and-nation/patna-high-court-strikes-down-nitish-kumars-total-prohibition-plan-terms-it-illegal/articleshow/54602261.cms>

Von Hirsch, A. (1992). Proportionality in the philosophy of punishment. *Crime and Justice*, 16, 55–98. <https://doi.org/10.1086/449204>

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