

A CRITICAL ANALYSIS OF THE BIHAR PROHIBITION AND EXCISE AMENDMENT ACT, 2022

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ABSTRACT

The Bihar Prohibition and Excise Act¹ was brought in order to deal with the problem of liquor intoxication in the State. A complete prohibition on alcohol was contemplated under the Act. It also provided for offences and punishments associated with them. But creation of additional administrative/judicial infrastructure were not considered for its implementation and the working of the law went haywire on multiple fronts. It increased the burden on courts and clogged them. The rise in bail matters was of particular concern. Such matters were also reaching the Supreme Court and the Chief Justice of India expressed concerns on the same. This led the State to bring amendments to the Act, but the provisions of the amendment also have not gone very well and fail to address multiple issues that existed in the earlier law.

Keywords : Bihar Prohibition Act, Judicial Process, Legislative Impact, Constitutionality.

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I. Introduction

THE BIHAR Prohibition and Excise Amendment Act, 2022² has been brought to amend the Bihar Prohibition and Excise Act, which was enacted in 2016. It had repealed the Bihar Excise Act, 1915³. Before bringing the fresh Act in 2016, the state had brought the Bihar Excise (Amendment) Act, 2016⁴ to amend the parent 1915 law. But the Patna High Court had declared the Amendment Act unconstitutional for being violative of fundamental rights, providing for

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¹ The Bihar Prohibition and Excise Act, 2016 (Bihar Act 20 of 2016).

² Bihar Act 3 of 2022.

³ Bihar and Orissa Act 2 of 1915.

⁴ Bihar Act 3 of 2016.

excessive delegation and disproportional punishments in *Confederation of Indian Alcoholic Beverage Companies v. State of Bihar*⁵, after which the State enacted the new law. Certain provisions of the new law were also challenged in the Patna High Court by alcohol manufacturers, and the Court excluded alcohol unfit for human consumption from the definition of ‘intoxicants.’⁶ The courts have not decided on the constitutionality of the Act yet and the Supreme Court called all such petitions to itself in 2022.⁷

The State has brought several amendments to the 2016 Act since then. The 2018 amendment⁸ made the Act less stringent. Then another amendment was carried out in 2020⁹, but the problems noted by the Patna High Court’s judgement continue to exist. The law was facing severe criticism—and continues to do so—from several stakeholders including the opposition and the judiciary. The law-and-order situation in the state has been alleged to be compromised due to the heavy burden on the police and administrative system to implement the prohibition. This was termed as the lack of legislative wisdom, vision and foresight by the Chief Justice of India.¹⁰ The object of legislature was not questioned, but the way of its implementation has led to the problems. According to a report citing official data, as many as 4,45,165 people were arrested under the Act and 2,09,78,787 litres of liquor were seized in the State by February 2022.¹¹

In February 2022, a division bench of the Supreme Court comprising of S.K. Kaul, J. and M.M. Sundresh, J. observed in its order that (a large) number of cases that were coming to the Supreme Court from the state arose out of the law.¹² It observed that the trial courts and the High Court were both crowded by bail applications to an extent that at some stage 16 judges (out of 26) of the High Court were listening to bail matters and prosecutions under the Act formed a large part of it. The court also observed that the denial of bails in many of such cases was leading to the crowding of prisons. It enquired from the state as to what analysis and assessment took place before the law was brought into force in terms of the court infrastructure

⁵ 2016 SCC OnLine Pat 4806.

⁶ *Bihar Distillers & Bottlers Pvt. Ltd. v. State of Bihar*, 2017 SCC OnLine Pat 620.

⁷ *International Spirits and Wines Association of India v. The State of Bihar*, W.P.(C) No. 001153/2021.

⁸ The Bihar Prohibition and Excise (Amendment) Act, 2018, Bihar (Act 8, 2018).

⁹ The Bihar Prohibition and Excise (Amendment and Validation) Act, 2020, Bihar (Act 10 of 2020).

¹⁰ Ananthakrishnan G, “CJI: No foresight in drafting law clogs courts, Bihar prohibition is example” *Indian Express*, December 27, 2021, available at: <https://indianexpress.com/article/india/cji-law-courts-bihar-prohibition-7691801/> (last visited on April 12, 2022).

¹¹ Piyush Tripathi “Over 4.5 lakh arrested in Bihar in 6 years for violating liquor law” *Times of India*, April 7, 2022, available at: <https://timesofindia.indiatimes.com/city/patna/over-4-5l-arrested-in-state-in-6-yrs-for-violating-liquor-law/articleshow/90695175.cms> (last visited on April 13, 2022).

¹² *Sudhir Kumar Yadav v. State of Bihar*, Diary No. 2482/2022; order dated February 23, 2022.

and the manpower required to deal with the litigation which would arise from such a statute. It also asked the state whether the plea-bargaining provisions can be taken recourse to deal with the scenario as it was emerging.¹³

The criticisms led the State to consider amendments in the Act and the Supreme Court was informed by the State in March 2022 that considering the overall scenario, it was proposing certain amendments to the Act in order to make it more efficacious and avoid some of the fall outs which have arisen based on the experience which the Government had while implementing the Act.¹⁴ The Amendment Bill was subsequently brought in and was passed by the houses of the State Legislature without much substantial discussion, it received the assent of the Governor on the next day.¹⁵

This comment focuses on the problems with the Act and instances where they have the potential of being declared unconstitutional. There are parts dealing with the discussion in the State Assembly on the Amendment, problems of excessive delegation, issue of proportionality, anticipatory bails and other provisions of the Act. In the conclusion, suggestions have been made to cure the problems of the law and to bring it within the vires of the constitution. Certain amendments to the contentious provisions have been suggested towards the end.

II. Discussion in the State Legislative Assembly

The Bill was brought in and passed by the Legislative Assembly (lower house) of the State on April 30, 2022. A member, while expressing his apprehensions about the amendments emphasized on the necessity of reexamination of the main Act by carrying out a comparative study from other states, expert studies and through surveys.¹⁶ He also proposed to consider bringing a fresh law after such examinations as multiple and frequent amendments tend to bring inconsistencies in the law and when such amendments are brought in a hurry, the existing discrepancies also continue to exist.¹⁷ A request to refer the Bill to a joint committee was also made by a member (which was rejected), stating that the house had unanimously passed the

¹³ *Ibid.*

¹⁴ *Sudhir Kumar Yadav v. State of Bihar*, SLP (Criminal) No. 1821/2022; order dated March 08, 2022.

¹⁵ Passed by the Legislative Assembly on March 30, 2022 and the Legislative Council on March 31, 2022. It was notified in the official gazette on April 1, 2022 after the Governor's assent.

¹⁶ Record of Proceedings from the date March 30, 2022, Fifth Session, XVII Bihar Legislative Assembly, page 76, available at: https://vidhansabha.bih.nic.in/pdf/proceeding/17th_5th/30-03-2022.pdf (last visited on April 13, 2022).

¹⁷ *Id.*, at 75, Proposal by Mr. Rajesh Kumar, Member.

Act in 2016, had a joint committee carried out a pros and cons analysis of the law then only, the situation for these amendments would not have arisen.¹⁸ According to him, these amendments were being proposed after strict observations by the Supreme Court of India.¹⁹

There were multiple amendments proposed to the Bill by members of the house, but all of them were rejected. The Minister while speaking on the Bill stated that the seventy-four designated Special Courts under the Act were so busy with the bail matters of those accused of consumption of alcohol that the courts were not able to proceed with the trial of cases relating to Liquor-Mafias and suppliers of alcohol. This meant that the State acknowledged the concerns raised by the Judiciary. The minister also added that while dealing with seized liquor, vehicle and conveyance used, the offices of District Magistrates and Superintendents of Police were heavily burdened and stuck into the procedures involved. Hence, to bring the proceedings in the courts on track and to shift the focus of the judicial and the administrative authorities on illegal suppliers and mafias and to ensure their speedier prosecution, these amendments were necessitated.²⁰

The minister stated that legal studies were conducted before proposing the amendments, but he neither stated as to the specificity of such studies, nor anything relating to this was released in the public domain after the Act was passed.²¹ However, the minister stated that as per the preliminary report of a survey conducted by the Chanakya National Law University (the report of which was also not available) people, especially women were happy with the law and believed that the law needs to be enforced even more strictly.²²

III. Excessive Delegation²³

The Amendment Act has conferred wide powers on the Government and the executive authorities. As per the amended section 37²⁴, which provides for penalty for consumption of

¹⁸ *Ibid.*

¹⁹ *Id.*, at 76, Proposal by Mr. Ajay Kumar Singh, Member.

²⁰ *Id.*, at 88.

²¹ *Ibid.*

²² *Id.*, at 89.

²³ The power of delegated legislation allows the executive to make rules for implementation of laws. There are limitations to this power and the core legislative functions can't be delegated, otherwise it amounts to excessive delegation. If a law suffers from this vice, it is not a valid law. *See, Makhan Singh Tarsikka v. State of Punjab* (1964) 4 SCR 797.

²⁴ The Bihar Prohibition and Excise (Amendment) Act, 2022, s. 4, reads as, "...Whoever, in contravention of this Act or the rules, notification or order made there under consumes liquor or intoxicant at any place or is found drunk or found under influence of any intoxicant, within any premises or outside, shall be arrested immediately and produced before the nearest Executive Magistrate. He shall however be released if he pays a penalty as may

liquor, the persons arrested for consumption of liquor shall be presented before the executive magistrate immediately. There is no provision as to sentencing and the relevant portion of the subsection 1 of the section provides that the person shall be released if he pays a penalty as may be notified by the State Government. The penalty has not been provided for and has been left for the Government to decide. The section further adds a proviso²⁵, which confers a power upon the State Government to make provisions for additional penalty or imprisonment or both in cases relating to repeat offenders. This can be done through notification issued by the Government. The production to the executive magistrate, determination of punishment by the Government and the default sentencing goes against the principle Separation of Powers²⁶.

The trial of the offences under the section has also been left to executive magistrate who shall try all such cases through summary trial. This is in a way delegation of judicial functions to the executive, a trend which has not been very popular lately. The Code of Criminal Procedure²⁷ provides distinct categories of Executive Magistrates²⁸ and Judicial Magistrates.²⁹ Though there are certain sections in the Code which allow trial by executive magistrates, but a trial by executive should be avoided because judicial decision making is a specialized function. The judicial officers go through training for discharge of their functions and conferring such powers to a non-specialized authority—that too with so wide discretion—goes against principles of Separation of Powers and Independence of Judiciary.

The section 37 and the provisions relating to confiscation, seizure and destruction of commodities, houses properties and vehicles don't lay down the quantum of penalty and the procedure required to carry out the proceedings, which has been left to the executive and is conferring arbitrary discretion. The mandate to leave the element of determination of penalty or punishment for an offence prescribed, which is a legislative function, at the mercy of the

be notified by the State Government. Failure to pay such penalty shall invite a simple imprisonment of one month...".

²⁵ *Ibid*, reads as, "...Provided that, in case of repeat offenders, the State Government may, by notification, prescribe additional penalty or imprisonment or both".

²⁶ Separation of Powers envisages the demarcation of powers between the three organs of the State. Though Montesquieu envisaged a strict separation, such is not feasible in India, but separation of powers and independence of judiciary are parts of basic feature of the Indian Constitution. *See, Union of India v. Madras Bar Assn.* (2010) 11 SCC 1.

²⁷ The Code of Criminal Procedure, 1973.

²⁸ *Id.*, s. 20.

²⁹ *Id.*, s. 6.

executive may have impacts on life and liberty of individuals. This also amounts to delegation of core legislative function to executive without broad guidelines, which is impermissible.³⁰

An instance of how unmindful the executive can be in implementation of the discretion is found in the rules notified³¹ under the amended Act. Rule 12A relates to release of vehicles, Conveyance, *etc.* seized on payment of penalty. The rule provides that for release of a vehicle the penalty shall be 50% of the latest insured value of vehicle/conveyance.³² The insured value is the value of the vehicle as assessed by the insurance company. Now this is so subjective that if someone is caught drinking in a car with a value of 4 lakhs, they would pay 2 lakhs as penalty and the one with a car of 40 lakhs would pay 20 lakhs. This will also lead to practical problems of implementation.

The argument isn't that differential punishment for the same offence can't be allowed. There are instances where judiciary imposes different punishments for the same offence based on facts and circumstances of the case among other relevant factors; like intention, motive, *etc.* Such cases are, however, those where the courts exercise judicial discretion which is backed by statutory sanction providing for maximum and minimum punishment for the offence. But when it is left to the executive to determine the punishment and it imposes the same mathematically then that would amount to arbitrariness. The rule 12A is not basing penalty on the offence, but on the extraneous element of the kind of vehicle that one is possessing. Can a murder committed in a cottage be less grievous than one committed in a bungalow merely because it was committed in a cottage?

There may be arguments that such determination gives the State a scope to put deterrence on the offenders based on their economic status. But let us consider a moot example where a driver purchases a high-end vehicle to ply it for tourists. One of his clients, while in the vehicle is caught with liquor. In such a situation the vehicle would compulsorily be seized and the poor driver would have to pay half of the value of the vehicle to get it released. The deterrence argument fails in such cases; and had the authority applied mind while framing rules, such problems could have been avoided.

³⁰ *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554, Constitution Bench.

³¹ The Bihar Prohibition & Excise (Amendment) Rules, 2022.

³² *Id.*, r. 3.

The clause 5³³ of the rule further provides that the amount collected as penalty shall be non-refundable irrespective of the outcome of court proceedings. It implies that even if a person is acquitted in a case, the penalty won't be refunded back to them. The vehicle can also not be left seized till the completion of the trial as after a certain period the rules mandate initiation of auction proceeding of unreleased vehicles. These provisions make the rules even more arbitrary and draconian.

The other rules notified further confer wide discretion on the Collector about the manner and quantum of penalty/punishment to be imposed, they are not being discussed here to limit the discourse to the Act only.

IV. Proportionality

The sentence imposed for an offence must be proportionate to the harm purportedly caused by the offence. This is an established principle of criminal justice. The Patna High Court located³⁴ the concept of proportionality in criminal statutes in article 21 of the Constitution by relying upon the observations of the Supreme Court constitution bench in *Mithu Singh v. State of Punjab*³⁵ which had relied on a catena of judgements while declaring section 303 of the Indian Penal Code³⁶ to be unconstitutional. After building of upon multiple pronouncements, the High Court relied³⁷ on *Vikram Singh v. Union of India*³⁸. The bench in *Vikram Singh* framed the proportionality test as, "Courts, however, have the jurisdiction to interfere when the punishment prescribed is so outrageously disproportionate to the offence or so inhuman or brutal that the same cannot be accepted by any standard of decency."

The Act which was declared unconstitutional envisaged a reversed burden of proof in proceedings under the Act. This continues to exist in the Act in the form of section 32 even after amendment. Certain provisions (sections 47 & 53) of that Act provided for a minimum of ten years of imprisonment. The provision of a punishment of not less than ten years took away the power of judiciary to determine the quantum of punishment and if this would be coupled

³³ *Id.*, r. 3(5).

³⁴ *Confederation of Indian Alcoholic Beverage Companies v. State of Bihar*, 2016 SCC OnLine Pat 4806, at 89.17.

³⁵ (1983) 2 SCC 277.

³⁶ The Indian Penal Code, 1860.

³⁷ *Supra* note 34 at para 89.20.

³⁸ (2015) 9 SCC (502), A full-bench of the Supreme Court accepted the principles of legislative supremacy and presumption of constitutionality while deciding on validity of the section 364A of the Indian Penal Code. It held that the courts show deference in interfering in legislative will and wisdom while enacting a provision, but the same could be done if the provisions were outrageously disproportionate, inhuman or brutal.

with the presumption of innocence, it might have led to serious consequences. This position has changed with the amendments, but the discretion conferred on judges in terms of sentencing is still limited as the Act provides for minimum punishments.

The 47th report³⁹ of the Law Commission of India, on the Trial and Punishment of Social and Economic Offences, has clearly recommended against providing for absolute liability in form of a minimum sentence. The Law Commission has laid down in clause 7.42 that public welfare should be the prime consideration in proper sentencing, and the extent and time up to which the society needs protection from the offender for a particular offence has to be seen; in conformity to this, the possibility of offender becoming a useful citizen has also to be seen. Clauses 7.43 to 7.45 discuss the factors for determination of proportionality; which include nature and circumstances of offence, prior criminal record and age of the offender, his background, health, education, social life among others. Clause 7.46 has held that sentences which are merely mathematically identical for violation of the same statute are improper, unfair and undesirable. Mathematically identical sentences indeed may in substance themselves be disparate.

Clause 7.47 of the report recommends that for the reasons discussed above, the discretion of the court to award sentence lower than the minimum should not be totally abolished. In Clause 7.52, the Law Commission has opined that if the punishable act has caused no harmful effects, the punishment may be mild; if the act has caused some harm but the offender can repair the damage done to society, probation would be appropriate; if the harm is serious, imprisonment would of course be required.

The Patna High Court, while determining the constitutionality had then posed to itself a question – was this response proportionate to the harm – and answered it in the negative as it found the penal clauses were notoriously overbroad and unspecific.⁴⁰ The court also pointed out procedural aspects that made it a badly drafted law.

The maximum punishment for consumption of alcohol under the Act used to be 10 years prior to the amendment. The amendment has left it for the Government to determine the punishment now. Comparing it to the Narcotic Drugs and Psychotropic Substances Act⁴¹, which is having

³⁹ Law Commission of India, “47th Report on the Trial and Punishment of Social and Economic Offences” (February, 1972).

⁴⁰ *Supra* note 34.

⁴¹ The Narcotic Drugs and Psychotropic Substances Act, 1985 (Act 61 of 1985).

a similar object of curbing the menace of drug and substance abuse, the section 27 of the NDPS Act contemplates a maximum penalty of one-year for consumption of substances. This huge disparity explains the disproportionality of the act.

Considering the provisions of the NDPS Act thereof, it is shown that while providing for punishment in relation to poppy straw, opium, opium poppy and psychotropic substances respectively, there is graded punishment in the sense where contravention involves small quantity, the maximum punishment is six months imprisonment or with fine, which may extend to ten thousand rupees or both. For contravention involving quantities more than small quantity, but less than commercial quantity, the punishment extends to ten years with fine, which may extend to one lakh rupees and when it involves commercial quantity the punishment is not less than ten years imprisonment with fine not less than one lakh rupees, but may extend to two lakhs.

Justice Navneeti Prasad Singh in the 2016 Patna High Court judgement⁴² had used an analogy of an imaginary case where a person out of enmity throws a bottle of liquor in someone's house. A raid by the authorities in such a situation would mean arrest of the person as well as confiscation of the house. This is the position of law even post-amendment. As per the original Act, even the possession of a pint could lend you in jail for a decade, without any remedy available. This position has hardly changed over the years.

V. Anticipatory Bail

The Supreme Court observed in the case of *Abhyanand Sharma v. State of Bihar*⁴³ that the Patna High Court was not a Bail Court, but a Constitutional Court, there was some serious problem in the State as 60% judges of the Court were busy hearing bail cases. The Apex Court asked the Patna High Court to come up with a mechanism to deal with the problem. The court also questioned the attitude of police arresting people without application of mind.

On the one hand, the courts are busy hearing bail matters, while on the other section 76(2)⁴⁴ of the Act provides that section 438 of the Code of Criminal Procedure shall not apply to

⁴² *Supra* note 34 at para 89.13.

⁴³ WP (Crl). 420/2021.

⁴⁴ *Supra* note 1, s. 76(2), reads as, "Notwithstanding anything mentioned in subsection (1) above, nothing in section-360 of Code of Criminal Procedure, 1973 (Act 2 of 1974), section- 438 of Code of Criminal Procedure, 1973 (Act 2 of 1974) and Probation of Offenders Act 1958 (20 of 1958) shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act".

proceedings under the Act and hence anticipatory bail could not be granted in these cases. Non applicability of anticipatory bails confers wide discretion on police when a case comes. They have very wide powers in respect to arresting a person.

The Supreme Court (full bench headed by the Chief Justice) in the case of *State of Bihar v. Raju Das*⁴⁵ however upheld anticipatory bails granted by the courts and orally observed that such a provision was disproportionate.⁴⁶ Even other statutes provide for non-application of anticipatory bail provision, but they are either for specific sections or to achieve certain objectives—which doesn't seem to be present in this case. In the matters of SC/ST Atrocities Act⁴⁷, even post *Subhash Kashinath Mahajan*⁴⁸ and 2018 amendment⁴⁹, the courts continue to grant anticipatory bails where the cases are prima-facie false or appear to be misuse of law.⁵⁰ The menace addressed by this law is certainly not as serious as the one in the SC/ST Act.

It is true that anticipatory bail is not a fundamental right of a person, but blanket ban on bail amounting to compulsory arrest on mere registry of an FIR or allegation of consuming liquor would infringe upon the right to personal liberty of the citizens, and such a provision is highly disproportional and arbitrary. The provision has no nexus to the object of the Act if seen reasonably.

VI. Other Provisions

Section 55 of the unamended Act provided that the offences under the Act were non-compoundable, which has been deleted by virtue of section 6 of the Amendment Act. This would mean that the offences would become compoundable now as per the provisions of the Code of Criminal Procedure. But since the offences under the act are victimless, it becomes

⁴⁵ *State of Bihar v. Raju Das*, Special Leave Petition (Crl.) No.8468/2017.

⁴⁶ Srishti Ojha, "Bihar Prohibition Act: 'Law Has Created An Impact On Working Of High Court, Judges Busy Hearing Bail Matters': Supreme Court Remarks" *available at*: <https://www.livelaw.in/top-stories/supreme-court-bihar-prohibition-and-excite-act-patna-high-court-bail-matters-189340> (last visited on April 16, 2022).

⁴⁷ The Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Act 33 of 1989).

⁴⁸ *Dr. Subhash Kashinath Mahajan v. The State of Maharashtra*, AIR 2018 SC 1498.

⁴⁹ The Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2018 (Act 27 of 2018).

⁵⁰ Shrutika Pandey, "SC/ST Act | When The Offence Appears To Be A Misuse Of Law, The Court Has The Power To Grant Anticipatory Bail: Chhattisgarh High Court", *available at*: <https://www.livelaw.in/news-updates/scst-act-when-the-offence-appears-to-be-a-misuse-of-law-anticipatory-bail-chhattisgarh-high-court-197130> (last visited on April 16, 2022).

tough to understand the working of process of compounding as compounding under the scheme of Code of Criminal Procedure is done by the victim.⁵¹

A member of the legislative assembly raised⁵² concerns about the amended section 37, as though it talks of forthwith release of first-time offenders, it doesn't provide the right for the same to the person,⁵³ which brings in the scope of arbitrary exercise of discretion by the officials involved. Another member proposed amendments to this and observed that the refusal to release the person based on a report by police or excise officer would lead to corruption and leave people to the whims of such officers.⁵⁴ He alleged that it was well known that there are cases where illegal liquor is manufactured and sold in collusion police officers in rural areas and if such officers were to give reports against accused, it is better to do away with the explanation, as the subsection 1 itself is sufficient to deal with the offender.⁵⁵ He also quoted from a Magadhi (*sic*) poet to explain the situation, which translates as "if the sages (protectors) started eating the cows, what could the CBI do!"⁵⁶

The section 70 of the Act which provided for immediate arrest of persons who have contravened or are or likely to contravene order of the collector under section 66 of the act has been done away with by virtue of section 12 of the Amendment Act. But that effectively doesn't affect the other parts because the provision was for a limited purpose and the individual offences still have provisions for arrest and the section 74 providing for detention or arrest without warrant continues to exist.

The amendment to section 80 adds a provision of production of arrested persons before the Special Court or the nearest Judicial Magistrate within twenty-four hours through the medium of electronic video linkage as an alternative to in-person production. It adds an explanation that if any question arises whether an accused person was produced in person or through the medium of electronic video linkage before the court, the production of the accused person may

⁵¹ The Code of Criminal Procedure, 1973, s. 320.

⁵² *Supra* note 16.

⁵³ *Supra* note 24, the relevant portion of 37 (1) reads "[Explanation 1:- It shall not be a right of the accused to be released upon payment of the required penalty. The Executive Magistrate, based upon a report by a police officer or an excise officer, may, for reasons to be recorded in writing, still refuse to release the accused on payment of penalty and commit him to such custody as he deems fit.]".

⁵⁴ *Supra* note 16 at 78, Proposed by Mr. Ajay Kumar Singh, Member.

⁵⁵ *Id.*, at 79.

⁵⁶ *Ibid.*

be proved by his signature on the order authorizing his detention or by video recording of the proceeding, as the case may be.

In reference to sections 15 and 16 of the amended Act, which provide for custody of arrested persons, seized articles and the destruction of certain articles, a member of the Assembly moved an amendment that all these proceedings be carried out in front of a magistrate.⁵⁷ The member observed that the deeds of police officers are not unknown and, in a State, where rodents drink thousands of litres of alcohol,⁵⁸ it would not be prudent to confer such powers to police officers and destruction be compulsorily carried out in presence of magistrate. The allegations and concerns were also affirmed to a certain extent when the minister in his response stated that till the instant date 2230 police and excise officers were terminated from their services, which meant that fears of corruption in exercise of discretion and implementation of the provisions of the amendments were not unfounded. There were objections relating to the use of electronic evidences (which have been allowed by the Act), as even doctored evidence could land an innocent person in jail without any investigation given the provisions of the act are cognizable and non-bailable⁵⁹.

VII. Conclusion

The Amendment Act has been aimed to focus more on punishing those involved in illegal trade and production instead of individual drinkers and to reduce the burden on the courts. But given these provisions, the Act has a potential of turning the State into a police state; a concern which Prof Upendra Baxi also shares⁶⁰. As implementation of law is one thing and searching the wardrobe of the bride on the night of her marriage to find alcohol is another.⁶¹ The society needs a balance. The Amendment doesn't address the concerns regarding implementation and

⁵⁷ *Supra* note 16 at 82, Proposed by Mr. Sameer Kumar Mahaseth, Member.

⁵⁸ “‘Rats drank it’: Cops as 1,000 litres of seized liquor disappears from police station” *Hindustan Times*, December 29, 2018, available at: <https://www.hindustantimes.com/india-news/rats-drank-it-cops-as-1-000-litres-of-seized-liquor-disappears-from-police-station/story-29vyjzzRCsYj2RjAP0gBdO.html> (last visited on April 16, 2022).

⁵⁹ *Supra* note 2, s. 76.

⁶⁰ Prof. Upendra Baxi, “Pre-legislative Impact Assessment”, *India Legal*, available at: <https://www.indialegallive.com/column-news/bihar-prohibition-law-judicial-backlog/> (last visited on April 16, 2022).

⁶¹ There were many such instances reported across the state, particularly towards the end of 2021, where even marriages were raided without warrant and police entered bride's room without presence of a woman personnel. A relevant new item for reference is; “Bihar police go all out to enforce liquor ban, raid bride room” *Telegraph India*, November 23, 2021, available at: <https://www.telegraphindia.com/india/bihar-police-go-all-out-to-enforce-liquor-ban/cid/1840113> (last visited on April 15, 2022).

impact. The number of pending cases would also not go down until the relaxations related to first time offenders of consumption are made retrospective in strict sense.

Section 1(3) of the Amendment Act extends the application of amendments to the pending cases.⁶² But the phrase ‘pending cases’ is vague and doesn’t clarify what is contemplated from the word ‘pending’, whether it is for the cases pending trial or in appeal or where people are serving their sentences. If it is for the former of the categories, then the concerns of burden on the institutions, including overcrowding of prison isn’t addressed. The State shall consider complete retrospective application of the provisions. This was also proposed by one of the members in the State Assembly.⁶³ The clause shall be amended to “...provisions of this Amendment Act shall apply retrospectively to all cases ever constituted under the Act”.

The legislature should determine the extent of fine in section 37(1). The explanation 1 to section 37(1) needs to be deleted. The powers of executive magistrate under section 37 shall be transferred to judicial magistrate. This can be done by replacing the words ‘executive magistrate’ by ‘judicial magistrate’ wherever it comes in the section. The punishment and penalty for repeat offenders under the proviso of section 37(1) shall also be provided by the legislature. The other provisions which leave determination of procedure and punishment to the executive shall also be amended to cure their defects. For instance, section 37(5) shall be removed as it provides for non-refund of penalty collected irrespective of the outcome of trial. This goes against the principle of natural justice. Other provisions that provide for non-refund of penalties shall also be done away with.

Post the deletion of section 55, the offences have become compoundable,⁶⁴ but the statute shall lay down detailed guidelines that should apply to determine whether a particular case can be compounded or not, this will help remove the arbitrary discretion that is feared to creep in.

The Amendment seems more of an attempt to deflect the heat that the State has been facing from the Judiciary—instead of bringing substantial changes. The powers of police and executive authorities across the provisions need to be checked, otherwise the Act would fail in

⁶² The Bihar Prohibition and Excise (Amendment) Act, 2022, s. 1(3), “*It shall come into force at once and the provision of this Amendment Act shall apply to all pending cases.*”.

⁶³ *Supra* note 16 at 86, Proposed by Mr. Ajeet Sharma, Member.

⁶⁴ *Supra* note 2, s. 6.

its purpose, and continue to draw flaks as it has been doing. the problems of excessive delegation and disproportional punishments and penalties need to be addressed.

The advices of a wholesome impact assessment study followed by comprehensive changes in the provisions based on the study shall be seriously considered to save the law. The State should understand that the Act is not in the area of pure criminal law. A proper jurisprudential analysis is also required therefore. The wholesome criminalisation needs a revisit. It must be seen whether the offence(s) need to be criminalised and if the answer is in affirmative, the extent of criminalisation should be determined. The law was meant to be a social welfare legislation and since it is to achieve the mandate of the article 47 of the constitution⁶⁵, it should be ensured that it remains directed towards its objective and doesn't become a crime control model⁶⁶, which it has effectively turned into.

⁶⁵ The Constitution of India, art. 47, reads as “***Duty of the State to raise the level of nutrition and the standard of living and to improve public health.***—The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health”.

⁶⁶ Crime Control Model is a system of Criminal Justice Administration where the focus of law is to suppress and control the crime, the aspects of individual liberty including due process of law are ignored because of the strict punishments proposed. This model is opposed to due-process model which is accused friendly and ensures fair trial. See, Kent Roach “Four models of the criminal process” 89 (2) *Journal of Criminal Law and Criminology* 672 (1999).