

Bihar, Nitish Kumar, and the prohibition debate

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Bihar Chief Minister Nitish Kumar responding to the opposition on the Chhapra hooch tragedy in the Assembly in Patna on December 14. | Photo Credit: [PTI](#)

Curtailling basic liberties on a presumption that individuals tend to abuse them is self-defeating.

Every law is enacted on a prior assumption that the capacity to ensure its purposes can be created. Bihar's Chief Minister Nitish Kumar owns the State's prohibition policy but seems bereft of the capacity to enforce it.

Nitish Kumar's sense of absolute moral conviction did not waver as the toll mounted from the recent illicit alcohol tragedy in Saran and Siwan districts. Nobody would be compensated for the loss of life, he insisted, as restive members of the State legislature demanded accountability. "We have been making such an appeal for a long time," he said, "that if you consume liquor, you will die."

There is a certain cynicism there, a peevisness that the people of Bihar are failing in a moral obligation to comply with his intentions. In his absolute moral certitude, Nitish Kumar seemed to overlook that there can be no recompense for the dead, and the living are blameless.

Enacted in 2016, Bihar's prohibition law criminalises a whole chain of activities: "no person shall manufacture, bottle, distribute, transport, collect, store, possess, purchase, sell or consume any intoxicant or liquor". Consumption comes last in the chain and is enabled only by all prior acts. It could be argued that the willingness of the consumer to hold up his link provides the incentive for the entire illicit chain. But that causal connection is not obvious: demand could create supply, but the converse too could be true.

Prohibition is not the sole factor causing deaths and disability due to illicit alcohol. Over a fifth of the deaths from alcohol poisoning in recent years have occurred in three States —Punjab, Haryana and Himachal Pradesh—where there are no legal impediments to the manufacture or distribution of spirits. Here the consumer who opts for an illicit rather

than a licensed source of supply may perhaps be aware of the risks involved in his quest for an altered state of consciousness. In States where prohibition is in force—Gujarat being another example, where a horrific tragedy occurred as recently as July—the seeker has no option but to tap a hazardous source.

Scale of culpability

An individual's susceptibility for altered states of consciousness is no criminal act. And the Bihar law recognises this grudgingly, by specifying a graduated scale of culpability along the chain of activities. A person or entity engaged in the manufacture or transportation of alcohol within State borders, without clear licence, would be liable for a fine of Rs.1 lakh and a minimum term of five years in prison. That punishment would escalate rapidly to Rs.10 lakh and life imprisonment for repeat offenders or very egregious violators.

The offence of consumption, with its lesser impact on society at large, would attract a fine of Rs.50,000 or a three-month term in prison for first-time offenders. For creating a “public nuisance” or permitting a home or other ownership premise to be used for drunken revelry, a person could attract a minimum imprisonment of five years, perhaps alongside a fine of Rs.1 lakh.

In tacit acknowledgment of the tardy procedures of the law, the Bihar law includes a unique provision that overrides notions of fairness in the confiscation of property and wealth. District Magistrates or Collectors, if convinced that death or injury has happened on account of alcohol, could order the person held responsible to pay Rs.4 lakh to the legal heirs of each of the deceased, or Rs.2 lakh to the person who has suffered serious harm. Relief could be granted by an appeal in the High Court, but only after at least half the ordained amount is paid out.

Scholars have struggled long years to reconcile between two conceptions of law: what it is and what it ought to be. Laws exist to be obeyed, and a lack of compliance invites the sanction of empowered authorities. A utilitarian view of law suggests that it is what it is, and never quite achieves the status of what it ought to be. It gains its authority from a habit of obedience that a “public” develops to the commands of a person or institution not itself under similar obligation.

In a view derived in some measure from theories of the social contract, law gains the compliance of the “public” only to the degree that it represents a general perception of what the ends of justice ought to be. Liberalism permits a range of human behaviours and the individual in society is entitled to the widest latitude so long as he does not bring “harm” to himself or others.

Threshold of social harm

All the freedoms granted by Article 19 of the Constitution (often called the rights to freedom clause) are limited at the threshold of social harm. The right to pursue a livelihood and engage in any manner of commerce is unfettered, except where it could be of harm to others.

After the arrogance of his early response, Nitish Kumar seemed to be stressing this rationale when he argued at a later stage that prohibition had been a resounding success. “Family bliss has returned and people are happier spending money on food and lifestyle,” he claimed.

There is little question that women, often at the receiving end of alcohol-induced abuse, are a powerful constituency backing prohibition. In the 1990s, Haryana and Andhra Pradesh introduced prohibition in response to powerful grassroots movements, but sheer impracticality ensured that both efforts were abandoned in quick time.



When exempted by law from liability, the minimum expectation that could be placed on official agencies is one of administrative capacity. Yet the story that has unfolded in Bihar is one of mounting incapacities. In December 2021, the Chief Justice of India, N.V. Ramana, referred to the Bihar prohibition law as a perfect instance of legislation devoid of foresight. Since last February, the Supreme Court has been hearing a petition calling for the law to be declared unconstitutional. Figures furnished by the Bihar State counsel in March reveal four lakh cases registered under prohibition law and 3.5 lakh arrests effected.

Though no figures are available for the specific offence connected with each arrest, it is fair to assume that the majority pertain to consumption or being found in a state of drunkenness. Recognising that this least egregious of offences was causing an alarming spiral of unheard cases, an amendment was introduced to the law in July, empowering executive magistrates in various jurisdictions to summarily deal with this lower order of crime. Though a powerful temptation, summary justice is never known to promote compliance with the law.

Constitutional mandate

There is a constitutional mandate for prohibition in Article 47, part of the Directive Principles. As with the directive to secure a ban on cow slaughter, the Constituent Assembly here strove to disguise its moral intent behind a scientific façade. The promotion of scientific agriculture and animal husbandry were the ostensible rationale behind the place the cow enjoyed in the Constitution. Likewise, wider objectives of nutrition and public health were portrayed as the ultimate object of prohibition.

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As initially drafted, the prohibition clause in the Constitution had few nuances: it just blandly asserted that the policy would be a check against moral dissipation. There was one member, B.H. Khardekar from Kolhapur, who spoke up against the presumption that alcohol was the surest road to ruin.

His intervention in the debate on November 24, 1948, was prescient in pointing out the many potential abuses: from promoting corruption to illicit sales. He drew attention to the disastrous experience of the US in enforcing prohibition, and while bowing in reverence towards Gandhi, insisted that the father of the nation would have preferred leaving decisions of personal choice to the individual conscience.

Many failed attempts later, it is time to recognise that good sense and conscience are all that hold up administrative rectitude. Curtailing basic liberties on a presumption that individuals have a natural tendency to abuse them, is self-defeating policy. Rather than engage in the fragmented calculus of gains and losses, public policy needs to be governed by a notion of overall gains in welfare.

For governments to recognise adult responsibility among the governed is, without question, a net gain for social welfare.

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