

DEFENDING LIBERTY AGAINST POLITICAL PROSECUTION

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

One of the oldest, most pernicious and widespread forms of abuse of state power in India involves the police and enforcement agencies selectively targeting political and ideological opponents of the ruling dispensation to interrogate, humiliate, harass, arrest, torture and imprison them, ostensibly on grounds unrelated to their ideology or politics, while sparing comparably placed supporters and friends of rulers of the day.

As a recent example, the [November 27, 2020 Supreme Court judgment](#) granting TV anchor [Arnab Goswami bail](#) says, not without considerable irony because of the personality involved, “The specific case of the appellant [Arnab Goswami] is that he has been targeted because his opinions on his television channel are unpalatable to authority.” Scores of others are currently so targeted. Many, not as fortunate as Mr. Goswami to be quickly bailed out by the top court, are languishing in prison in inhuman conditions. Is this use of state power legally permissible? Is there no escape for victims of such abuse of state power? Is their only remedy bringing an action for wrongful prosecution years later — if they are acquitted and after suffering through many years of process as punishment? Or is there a legal remedy for nipping this evil in the bud, at the very outset, to protect the life and liberty of the accused?

Also read | [Charge sheet filed against Arnab Goswami in 2018 abetment to suicide case](#)

The problem is that the illegality involved in this type of prosecution is not self evident. At first glance, the prosecution appears legally kosher — acting on information about legal infractions, the police pursue the accused as per law. The illegality becomes plain when two legal questions are clearly distinguished and separated: first, the legality of the exercise of prosecutorial discretion in the selection of the accused for being investigated and prosecuted; and second, the merits of the criminal case filed against them. The two are independent legal issues and should not be wrongly conflated.

On the first question, the applicable legal standard is that while the police and prosecutors in common law jurisdictions enjoy vast discretion in deciding who they may pursue and who they may spare, the choice of accused must not be based on grounds that violate Constitutional rights, including the Article 14 right to equal protection of the law. The accused should not be selected, either explicitly or covertly, on constitutionally prohibited grounds. The illegal selection of accused based on grounds prohibited by the Constitution is called “selective prosecution”.

In the [words of then Chief Justice W. Rehnquist of the United States Supreme Court](#), “A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution.” (*United States v. Armstrong* (1996)). “Selective prosecution” is thus a constitutional claim asserted by defendants to assail the proceedings against them on the basis that they were selected for being prosecuted in violation of Article 14 because the grounds of selection are constitutionally prohibited and are arbitrary. When the choice of accused runs afoul of the Constitution, the entire criminal proceeding is vitiated, irrespective of the determination of the second issue, *viz.*, whether the accused are convicted or acquitted on the charges brought against them. Once the proceedings fail under the first issue, there is no legal basis to proceed to the second issue., *i.e.*, trial on the merits of the case. The theory is that the Constitution

cannot be violated to uphold the law — such an approach would spell doom for the Constitution. The selective prosecution claim must be adjudicated as a threshold issue, with the prosecution being quashed at the outset of the criminal case if the claim is justified. In the context of this discussion, the constitutionally prohibited ground we are confronting in India is the political or ideological affiliation of the accused. It is an arbitrary ground that violates the Article 14 guarantee of equal protection of the law.

Also read | [Arnab Goswami's wife accuses Dushyant Dave of 'selective targeting' of her husband's appeal for bail](#)

The United States Supreme Court has a long record of experience with the claim of selective prosecution relevant to us as it is based on American equal protection jurisprudence to which our own Article 14 traces its roots.

In *Yick Wo v. Hopkins*, the [United States Supreme Court said](#) some 135 years ago (in 1886) that to punish some persons for “what is permitted to others as lawful, without any distinction of circumstances [is] an unjust and illegal discrimination”. The Court said further, “Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is ...within the prohibition of the Constitution.” Chief Justice William Rehnquist said in *Armstrong*, “A prosecutor’s discretion is subject to constitutional constraints... One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment... is that the decision whether to prosecute may not be based on “an unjustifiable standard such as race, religion, or other arbitrary classification”.... Justice John Paul Stevens said in the same case, “the possibility that political or racial animosity may infect a decision to institute criminal proceedings cannot be ignored... For that reason, it has long been settled that the prosecutor’s broad discretion to determine when criminal charges should be filed is not completely unbridled...”

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Our courts have not recognised selective prosecution as an independent claim because of the erroneous assumption that the lawfulness of prosecution can only be taken up after the trial, if the accused is acquitted. Thus, for example, the 2018 Report of the Law Commission on ‘Wrongful Prosecution (Miscarriage of Justice): Legal Remedies’ discusses remedies for wrongful prosecution available only if and after the accused is acquitted. Remedy after acquittal comes far too late, well after a brutal and long drawn out criminal justice process that upends the lives of the victims. Also, the right against selective prosecution cannot be extinguished by conviction. Separate from post-acquittal actions for wrongful prosecution (which will still be available), the claim of selective prosecution is a threshold issue that is required to be adjudicated at the outset of criminal proceedings (even during the investigation stage) irrespective of the merit of the charges.

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The judgment of Justice D.Y. Chandrachud in the Goswami case is crucial in this regard. It provides a much needed and long awaited legal opening to strengthen the recognition and use of the selective prosecution claim in India to counter politically coloured prosecution unleashed by the state and defend our liberty. In addition to acknowledging Mr. Goswami’s claim that he is being targeted for opinions he holds and expresses, the judgment says, “Courts should be alive to... the need ...of ensuring that the law does not become a ruse for targeted harassment ...The doors of this Court cannot be closed to a citizen who is able to establish *prima facie* that the

instrumentality of the State is being weaponized for using the force of criminal law". The Goswami judgment also quotes the 2018 Supreme Court holding in [Romila Thapar v. Union of India](#) that, "[T]he basic entitlement of every citizen who is faced with allegations of criminal wrongdoing is that the investigative process should be fair. This is an integral component of the guarantee against arbitrariness under Article 14 and of the right to life and personal liberty under Article 21." To strengthen the protection of civil liberty, equality and democracy, it is time our courts — at all levels — recognise selective prosecution as a threshold constitutional defence against the abuse of police and prosecutorial power.

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