[**Abusing state power**](https://www.dawn.com/news/1660514/abusing-state-power)

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PROSECUTIONS have become the flavour of the season, ever since the BJP regime headed by Narendra Modi came to power in 2014. The law of torts deals with the civil offence of malicious prosecution. A tort is a civil wrong — as distinct from a criminal offence — and it is punishable by payment of monetary damages to the complainant by a decree of a civil court.

There is no code of torts in the UK. Nor did the British rulers of India draw up one for India. Indian courts relied on English cases.

This state of things continued in India after independence. An English authority on torts law defines the civil offence of malicious prosecution in these words:

“The kind of damage contemplated by this tort are three sorts, one of which is sufficient to support this action. First, damage to his fame, if the matter whereof he be accused be scandalous. Secondly, to his person, whereby he is imprisoned. Thirdly, to his property, whereby he is put to charges and expenses.

Malicious prosecutions are launched by the state.

“The plaintiff in an action of malicious prosecution was the accused in the prior prosecution and the defendant was the accuser. In his subsequent civil action, the plaintiff has to establish four things. He must, first, show that the defendant prosecuted him; secondly, that the prosecution ended in his favour; thirdly, that there was no reasonable and probable cause for the prosecution; and fourthly, malice.”

In false imprisonment, the defendant acts directly in restraining the plaintiff; in malicious prosecution he does this indirectly by setting official action in train. Hence, the distinction between ministerial and judicial acts of officials.

That apart, the wrongful continuation of a prosecution after the defendant gets to know that it is baseless is sufficient. For the purposes of this tort, a criminal charge includes all indictments involving either scandal to reputation or the possible loss of liberty to the person. Preferring a complaint by itself is not sufficient: the test is whether proceedings have reached a stage at which they damage the plaintiff. So the question whether or not the defendant prosecuted has to be answered by a consideration of the total situation.

In England, as in India before and after independence, any citizen can launch criminal prosecution unless there is a statutory requirement for the state’s sanction or the consent of the advocate general of the state.

The test was well defined by Lord Atkin in 1938. He held “an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed”.

The malicious prosecutions that clog the dockets of criminal courts are not ones launched maliciously by private individuals. They are launched by the state, abusing the services of the police, intel agencies, and servile lawyers.

This is worse than abuse of state power for political ends. It is a gross violation of the right to “personal liberty” for which the state itself is liable in damages to the aggrieved citizen. A Canadian case is relevant. The relevant questions are: who is responsible for causing these afflictions and how should the responsibility be fixed? Who is responsible for inordinately long-drawn process of prosecution? Does initiation of such wrongful criminal proceedings amount to abuse of powers by police agencies and prosecutors? How can the victim be compensated?

The Canadian sup­­­reme court, in ‘Nelles vs Ontario’, while deciding the issue of prosecutorial immunity, held: “The attorney general and crown attorneys are not immune from suits for malicious prosecution. … In the interests of public policy, an absolute immunity for the attorney general and … the crown attorneys, is not justified. … As such, the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted.”

Citizens should invoke this case against the state. For the prosecutor appointed under the Criminal Procedure Code draws a small salary and is dependent on the state government.

In May 1970 a special investigation squad of the Maharashtra Police put on trial 223 Muslim citizens on the most heinous of charges — murder. Representations made to the government against the squad were referred by it to the squad itself. “It has been noticed in the course of this inquiry that whenever representations have been made they are sent to the department concerned and inquiries asked to be made by the head thereof who in his turn often passes it down to the local head of the department,” the inquiry commission noted. The commission was set up by the Maharashtra government to inquire into the communal riots in Bhiwandi and two other cities in Maharashtra.

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