

कानून

अङ्क
१३३



लगानी मैत्री कानूनी पूर्वाधार:आर्थिक समृद्धिको आधार

कानून व्यवसायी



क्लब, काठमाडौं

निन्दन्तु नीतिनिपुणा यदि वा स्तुवन्तु ! लक्ष्मीः समाविशतु गच्छतु वा यथेष्टम् !!
अथैव वा मरणमस्तु युगान्तरे वा !!! न्याय्यात्पथः प्रविचलन्ति पदं न धीराः !!!!
(निन्द्या होस् वा स्तुति होस्, धनोपार्जन होस् वा नहोस्, मृत्यु पछि वा तत्काल नै किन नहोस्- प्राज्ञहरूले न्यायको बाटो छाड्दैनन् ।)
-भर्तृहरि

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क्लब कार्यसमिति

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उपाध्यक्ष: व.अ. नरेन्द्रप्रसाद पाठक
सचिव: प्रा.डा. वीपककृष्ण श्रेष्ठ
कोषाध्यक्ष: अ. श्यामकुमार खत्री
सदस्य: व.अ. कमलनारायण दास
सदस्य: व.अ. श्यामप्रसाद खरेल
सदस्य: व.अ. लक्ष्मीप्रसाद उप्रेती

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सदस्य : अ. रत्नकुमार खरेल
सदस्य : अ. अन्जिता खनाल
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ज्ञानु महर्जन
फोन: ९८५१०-८७८२८
E-mail: bhorizon2010@gmail.com

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- धैरवी प्रकाशन, पुतलीसडक

- दीपक पुस्तक भण्डार, पुतलीसडक

- यस पत्रिकामा प्रकाशित लेखहरूमा व्यक्त विचार लेखकका नितान्त व्यक्तिगत हुन् ।
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- प्रकाशित सामग्रीको सर्वाधिकार सम्बन्धित लेखकका हकमा बाहेक प्रकाशकमा सुरक्षित छ ।

प्रकाशक

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E-mail: kanunmagazine@gmail.com

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- हामीले पाद टिप्पणी शैली अपनाएका छौं ।

'Next Gen' in Organized Crime



Advocate Subash Acharya¹

1. General Introduction

Organized crime is an offence committed in organized manner for personal gain: power, profit and position; in contravention of existing law and order. It is characterized by profit-driven nature of power and profit; and can be traditional, territorial-based or transnational.² The common features of organized crime include the following:

- Planned criminal activity for profit around social, ethnic, or business relationships, or around a certain product or opportunity.
- Use of fear, corruption or violence to achieve the profit.
- Misuse of positions (fixer) to protect their interests and avoid arrest and adjudication.

Organized crime differs from individual crime in the modus (activities) that it is committed in organized manner (group). Unlike the 'conventional' crimes such as murder, rape, robbery etc.; many of the organized offences are: *victimless*, and therefore the parties affected may not show interest in bringing the matter to the attention of the police. Even when there is a clear victim, the person may be reluctant to report for fear of revenges or with the impression that complaints would be useless. So, very little organized crime is registered.

The definition of organized crime varies from agency to agency, from federal to state, and from state to state. One should be sure to use the same definition employed by the jurisdiction in which the case is worked. Principally, it refers to acts that are both 'mala in se' and 'mala prohibita', and has been committed in organized manner.

Howard Abadinsky defines organized crime as- A nonideological enterprise that involves a number of persons in close social interaction, organized on

a hierarchical basis for the purpose of securing profit and power by engaging in illegal and legal activities. Positions in the hierarchy and positions involving functional specialization may be assigned on the basis of kinship or friendship, or rationally assigned accordingly to skill. The positions are not dependent on the individuals occupying them at any particular time. Permanency is assumed by the members who strive to keep the enterprise integral and active in pursuit of its goals. It eschews competition and strives for monopoly over particular activities on an industry or territorial basis. There is a willingness to use violence to achieve ends or to maintain discipline. Membership is restricted, although nonmembers may be involved on a contingency basis.³

Organized Crime Prevention Act, 2014 defines organized crime as-

If a person commits a crime on behalf of the criminal proceeds of criminal group or commits a serious crime knowingly as a member or founding member of criminal group or on the direction of or on behalf of such criminal group.

For the purpose of this Act, the offences shall be taken as serious offence which is punishable by at least three years' incarceration⁴

Ronald F Becker writes: "Organized crime can itself be viewed as a business, for it provides training, uses merit promotion, and depends for success on a peer group who operates with substantial amounts of capital."⁵ The common 'job' they commit are:

- Extortion. Extortion means procuring money for protection. Usually, the protection is sold against permission of handling the business in 'their premises'.

¹ Author is MA English, LL.M. (Gold Medal), and teaches at NaLC & NLC, Tribhuvan University.

² Transnational covers not only offences committed in more than one state, but also those that take place in one state but are planned or controlled in another. Also included are crimes in one state committed by groups that operate in more than one state, and crimes committed in one state that impact on other states. The implied definition of "transnational organized crime" encompasses virtually all profit-motivated criminal activities with international implication.

³ Abadinsky, Howard. *Organized Crime*. Chicago: Nelson-Hall, 1997, p. 5

⁴ Sec. 3

⁵ Becker, Ronald F. *Criminal Investigation*. Maryland: An Aspen Publication, 2000, p. 366.

- Drug dealing. The illegal drug trade is a global black market dedicated to the cultivation, manufacture, distribution and sale of drugs that are subject to drug prohibition laws.
- Loansharking. In loansharking, money is lent at usurious rates, and collected by use of force. Generally, loan sharks make two kinds of loans:
 - The 'knockdown loan' has a specified schedule of repayment, including principal and interest.
 - The 'vig' requires total payment at a particular date with vigorish.
- Fencing. Fencing means buying stolen goods and reselling them for profit. The fence acts as a middleman between thieves and the eventual buyers of stolen goods who may not be aware that the goods are stolen.
- Organized theft. Organized theft rings are made up of individuals who have chosen a career as thieves and con artists.
- Kidnapping. The offence contains the ingredients: the taking or carrying away of one person by another, by force or by fraud and without the consent of the person so taken or carried away, and without lawful excuse. The nature of the offence is an attack on, and infringement of, the personal liberty of an individual.
- Assassination. Assassination is the killing of a prominent person like politician, law enforcement and media figures for payment.
- Labor union corruption. Labor racketeering involves the infiltration, domination, and use of a union for personal benefit by illegal, violent, or fraudulent means. It uses many means, including
 - strike breakers (head thumpers used to disperse picketers),
 - picket protectors (head thumpers used to protect picketers),
 - the obtaining of juicy union contracts without the necessity of competitive bids (providing substandard material and workers to enhance profit), and
 - initiating strikes and resolving strikes (generally to increase union coffers with the intent of using the money or stealing it).
- Corruption. Taking illegal gratification by misuse of system of authority. It is carried out under disciplined organizational structure to acquire undue benefit.

2. Organized Criminal Groups

Organized crime can be defined by the members and the activities of a group. However, no two organized crime groups are exactly alike. What makes them similar is the 'goal of profit'. Organized criminal groups may exist under various forms:

- a) Consortium: The union of fortunes, or the joining of several persons as parties to one action. It is 'an agreement among or the combination of groups to undertake an enterprise beyond the resources of any one member' (*Webster's Ninth New Collegiate Dictionary, 1983*).
- b) Cartel: A combination of producers to control, monopolize, and restrict competition of the sale and price of a particular product or service (*Black's Law Dictionary, 1990*).
- c) Syndicate: An association of individuals who wish to carry out a business transaction, usually financial in nature. The risk of any single investor is diminished because of this partnership.
- d) Network: A group of three or more persons linked together in systems, basically in tree structure, by the help of some technology system.
- e) Organization: An association of three or more than three persons to conduct 'business'; organized to become more effective and efficient.
- f) Gang: Highly or loosely structured group of individuals, usually in kith and kin, who form alliance to make money.

United Nations Convention against Transnational Organized Crime (2003) defines organized criminal group.

Organized criminal group shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.⁶

Organized criminal group may be highly structured or loosely structured. Recently, the former are losing out to the latter. Traditional 'hierarchical structures'⁷

⁶ Article 2(a)

⁷ Hierarchical structures refers to the kind of groups that emerge in low-governance areas around the world, which have an institutional identity of their own and typically engage in a wide range of criminal activities in the territories they control (i.e. "the mafia" and similar structures).

are being replaced by 'loose networks'⁸ of criminals. Organized crime is increasingly operating through fluid networks rather than more formal hierarchies. This form of organization provides criminals with diversity, flexibility, low visibility, and longevity.

Organized crime groups share commonalities in their methods and goals. Their illegal activities are conspiratorial, they use force to commit acts, insulate their leadership, attempt to influence politician or personnel through gratification, and wash illegal money investing in legitimate businesses.

The basic attributes of an organized group includes the following features:⁹

- An absence of political ideology. What is best for the organization regardless of political affiliation is what is embraced and supported. When the group is involved in politics, the group's objective is to gain protection or leverage for its members and activities.
- A hierarchical structure. A hierarchical structure is designed to insulate those at the top from the conduct of those at the bottom. Those at the top are accorded respect and deference based on position rather than personality. As in the military, the lesson is to 'salute the uniform, not the man'.
- Longevity into perpetuity. The ultimate objective, after procuring profit, is to ensure that the organization and its activities withstand death or incarceration of leaders. The assurance that the organization will take care of its own (taken as a promise or a threat) provides the impetus for loyalty and a disincentive for cooperating with the authorities.
- Division of Labor. Positions and their functions of the members are determined based on proclivity and skill for the task. The Kingpin positions at the top of the organized crime as boss. Under him, the enforcer carries out the commands for illegal activities. A fixer may have the responsibility for ensuring politicians and law enforcement agents

on pay roll. A cleaner may be called upon to sterilize a crime scene. A launder is responsible for finding legitimate pathways for the money earned.

- Anticompetitiveness. Organized crime groups abhor competition and follow the chain of command.
- Set of rules. Organized crime groups remain under a set of rules. The violation of any rule is sanctioned severely. The most common sanction is serious injury or death.

3. The 'Next Gen' in Organized Crime

The real threat of organized crime cannot be reduced to the violence associated with criminal markets. The latest wave in organized crime is flexible groups known as 'networks'. Networks are an adaptive response to law enforcement pressure on the more visible traditional hierarchies. As traditional groups are weakened through repeated arrests and seizures, the narrative goes, market gaps are quickly filled by low-profile, agile groups. This alleged evolution in organized crime would be parallel to the development of 'cell structure' in terrorism.

In fact, these networks are hardly groups at all. With no independent institutional identity, they are nothing more than commercial connections of varying durability between individuals, all responding to a common interest in making money. It is sometimes perceived as the leadership of the traditional hierarchical groups coordinating their activities in a vast global conspiracy.

Perhaps it is safest to say that the groups themselves have become less important than the markets with which they engage. Hence, organized crime, today, seems to be less a matter of a group of individuals who are involved in a range of illicit activities, and more a matter of a group of illicit activities in which some individuals and groups are presently involved. If these individuals are arrested and incarcerated, the activities continue, because

⁸ The 'loose networks' may be a reference to the mutable commercial ties between buyers and sellers of contraband in illicit markets around the world. Human beings seem to have a natural tendency to self-organize, and do so spontaneously when no higher authority provides order. People and activities that the state fails to regulate tend to fall under the control of local actors, who then vigorously defend this power from reacquisition by the state. Without the formal apparatus of government and access to the courts, local strong men are compelled to settle disputes with violence, or at least the credible threat of violence. These men, and the organizations they build, constitute groups most commonly associated with 'organized crime' in the public imagination. (i.e. the Yakuza of Japan; the Triads of Hong Kong and the Tongs of Chinatowns worldwide; the favela gangs of Brazil; some street gangs in the United States, Central America and the Cape Flats of South Africa; and many others).

⁹ Becker, Ronald F. *Criminal Investigation*. Maryland: An Aspen Publication, 2000, p. 365.

the illicit market, and the incentives it generates, remains. Strategies aimed at the groups will not stop the illicit activities if the dynamics of the market remain unaddressed.

3.1 Some notable cases of networks in Nepal

a. QNet case

QNet is a multi-level marketing company operating on Asian region having its executive office in Malaysia, India and Dubai. It is a part of the Hong-Kong based company operated by Qi group. This group aimed to establish a business in pyramid structure which had been banned in Nepal by Home Ministry in 2003. The company does not have any legal registration in Nepal.

QNet group had been alluring people by advertising itself as an investment in an networking business with exciting packages of 10-year tour packages to various countries, including Thailand, Malaysia and the UAE. The company had been collecting minimum of Rs 350,000 from each member as termed as investment on the company. Functioned in a pyramid form for illegal commission, one becomes member and he is required to enroll more members under the scheme. Under this scheme, the Member gains what other members lose. The more members they make more commission gained. The cycle goes on to earn profit of their investment, unknown to many of them that they are engaged in fraudulent activity.

Upon investigating police raided on Siddhartha Foodland, Baneshwor where QNet group were holding a meeting on its operation and training seminar on pyramid business. Police arrested 120 people who had been attending the seminar. Police charged the main fourteen persons in the offence of fraud and organized crime on 2074/04/11.

b. Herbo International

Herbo International was established in 2005 and had been operating in 30 districts of Nepal and several others countries like India, Malaysia and Singapore. Herbo International is a multi-level network business operating similarly as QNet.

Herbo International has been selling Herbal product to consumers at higher rate than usual market price through the multi-level marketing

approach, which is against the existing laws of Nepal. Similar to QNet, Herbo international lured people to be their member and charged membership fee, then the member had to enroll more members. The more members they enroll the more commission they get.

The group had been collecting minimum of Nrs 6000 to Nrs 25000 membership fee assuring member to make minimum of 10,000 to 40,000 daily income. The Supreme Court of Nepal has already declared the business as illegal by saying that such businesses hold no legal ground for operation and its business model is against the Competition Promotion and Market Protection Act, Black-marketing Act and Consumer Protection Act.

c. Gold Quest

Gold Quest is Hong Kong based multi-level marketing company. It also works similarly to QNet and Herbo international. Government of Nepal banned Gold Quest in 2003 calling it illegal. The business runs on pyramid structure form one become member and they are required to enroll more members under the scheme. The group lured people by offering a gold coin for Rs 37,500 and a bonus of \$4,000 after recruiting 100 more members to the scheme and claimed they could make up to NRs 25,000 per day.

d. Biomatrix case

It originated from the Government decision itself which indicates the role of fixer. Government of Nepal made it compulsory to health checkup in listed companies for foreign employment. According to the Foreign Employment Act, 2064 sec 72(1) "A worker who goes for foreign employment shall, prior to going abroad, get his or her health checked up by a health institution having obtained permission from the Government of Nepal." Hence the health checkup for the foreign employment should only be done with the permission from government to legally carry out the health examination process. The door made was lead to those companies which were listed by Government itself. It banned open business on one side and on the other hand obstructed clients' choice to fair access to health checkup in desired polyclinics; and consequently collected 'fees' in heavy rates.

3.2 Impact of Globalization

Crime originates not from the vacuum. It is a byproduct of social environment and individual desire, economic structure and means to end. The wider the people have relation, the wider the impact it leaves; both positive and negative. In one hand globalization has made the world smaller; it also had made crime accessible by the same token.

We all know that internet access and telephone have revolutionized global communication; and facility of airlines has squeezed the globe. The growing interconnectedness of the nations and global liberalization of trade have enhanced global tourism; and has made a wide range of products and services virtually accessible anywhere in the world. But, what is the regulatory mechanism to global governance? The open seas, which constitute three quarters of the earth's surface, remain essentially ungoverned. And, this deficiency has produced a sort of regulation vacuum in which transnational organized crime does flourish. People and goods can move more cheaply than ever before, and criminals and contraband can only be interdicted by national governments. Sometimes, concern of State and the question of illegality also differ. For example, transportation of *Raktachandan* is strictly prohibited in Nepal; whereas it is highly demanded in Chinese houses.

The trait of change itself provides opportunities for organized crime. Advantages of globalization such as easier and faster communication, movement of finances and international travel, have also created opportunities for transnational organized criminal groups to expand their activities. Due to this, traditional, territorial-based criminal groups have been partially replaced by more flexible networks that go beyond the nations. Hence, the pattern of organized crime is neither fixed and the same nor limited within the territory. It affects all countries of supply, transit and demand.

Nepal is 'global-touch' viable at the window country in-between China (mass population) and India (open border). Global-touch' viability of Nepal at the same time is 'green-transit' to China and India. Hence, the problem of organized crime in Nepal is not only a domestic challenge; it's a global challenge that must be met with a concerted global response.

The advance of globalization has impacted on organized crime in unpredicted ways; the vast of it can be described under two following headings:

a. Direct impact

For some markets like drug trafficking or labor smuggling, most of the parties are willing participants. Many die as a result of their choices. Several Nepalese are smuggled by road or from Tribhuvan International Airport to various countries. They are smuggled even to America starting from TIA in Kathmandu to India - Brazil - Ethiopia - Bolivia - Peru - Ecuador - Cambodia - Panama - Costa Rica - Honduras - Guatemala, Mexico and finally to USA. This is one route; and there are many.

Hence, organized crime does not take place in single location. It originates in one location and moves concurrently into various other locations. So it can be said that the impact of organized crime is often realized in a different country than that where the profits accrue. Crimes may appear victimless when the victims are located on the other end of the world, and criminals who bring in money by exporting problems may receive popular support. For example, people residing in remote areas that produce drugs may see no problem with working for the trafficking groups. The drug addicts are located other-where. Similarly, those who use drugs in consumers' countries rarely consider the way that their consumption may be affecting violence and stability in producer and transit countries.

It requires, therefore, global concern to hit the organized crime in organized manner. A local or national government may not suffice to combat with organized smugglers singularly. Many mistakenly believe the primary impact of product counterfeiting is loss of revenues to rights holders, but the crime has far more serious implications. The profits generated through natural resource smuggling are driving whole ecosystems to the brink of extinction. The true costs of this crime are impossible to reduce into price figure.

b. Indirect impact

Aside from the damages directly caused by specific forms of crime, organized crime groups gradually undermine the authority and the health of the official government. Insofar as the official state structures provide value, this value is threatened by the growth of parallel structures. Organized crime groups are inherently unaccountable, they are not subject to democratic controls, and their chief aim is the enrichment of their membership, not the advancement of society. Where they are predominant, development can become impossible, because any contract that is not to the advantage of the dominant groups will be nullified.

If we minutely observe the 'discourse of sustainable development' in Nepal, we find some common attributes under all governments no matter led by whom! Why some notable 'big contractors' only get the government contract of development? Why the 'big contractors' are not punished even though they intentionally non-performs the obligations? How is it possible to see the same 'big contractors' in all government led by either parties? What is the driven force that makes 'big contractors' above the law? If we dig beneath the surface, we will find an answer that 'big contractors' are predominant, and they are boss of their chain and wheel where the leaders are recruited as fixer.

Such situation leads into worse functional mechanism of state structure. And, where the official state structures are particularly bad, organized crime groups may appear relatively attractive. Since the network groups do not seek to wrest territory from state control, their impact is even more sinister. Most transnational trafficking requires smuggling, and the surest means of smuggling is through corruption. In poorer states, the corruption can go straight to the top, and the highest authorities can quickly become manipulated by traffickers. If opposed, these groups can engineer the removal of problematic officials, up to and including the chief executive. It is that consequences that Nepalese are suffering from.

The solution in these cases is to improve governance, to demark the system from the boundary of chain and wheel established by the boss, and to execute law strictly. But, who will do so? The one who has will to power, who knows it but detach oneself from it, and who can distance oneself from 'honey of money, arbitrary power and unlawful perpetuity'.

3.3 Notable Decisions of Supreme Court in Organized Crime

In *Durga Upreti v. Government of Nepal*¹⁰ the defendants forged public documents and seal in order to open an account in the bank to exchange stolen travel check and withdraw money. Charge-sheet was filed with claim of pursuant to No. 1 and 2 of Chapter on Fraud, and punishment as provided by No. 4 and 5 of the same Chapter under Muluki Ain, 2020. In this case the Supreme Court of Nepal decided that 'organized crime has typical nature different from general offence. These two forms of crime ought not to be viewed from the same perspectives. In organized crime persons involved

do have separate roles; it is committed with extensive planning and widespread preparations, and is accomplished in stages of acts of the persons engaged in various roles'.

In *Pannalal Sahani v. Government of Nepal et. al.*¹¹ the defendants kidnapped and abducted a minor with ulterior motive to get ransom. They were charged pursuant to No. 1, 2 and 3 of Chapter on Kidnapping and Abduction with claim of punishment pursuant to No. 3, 7, 9 and 12 of the same Chapter under Muluki Ain, 2020. In this case, the Supreme Court of Nepal explained that 'the offence of kidnapping and abduction is committed in organized manner. Thus, usually there is involvement of more than one person with different roles. Single or a few persons may be present in scene of crime than actual persons involved in the commission of the offence. Hence, a participant to offence who is not present in scene of crime is never subsidiary. Their roles may be as equal as or more important than persons seen in the scene of crime'.

In *Government of Nepal v. Raju Lama*¹² the Supreme Court has decided that narcotic drug offence is an organized crime and it involves layers of participants in commission ranking as principal offender and accessories. The conviction of accessories presupposes the existence of multi participants in organized crime.

4. Conclusion

The totality of organized crime can be summed up in two different models: the bureaucratic/corporate model and the patrimonial/patron-client model. Bureaucratic/corporate model operates under a structured form like a bureaucratic organization or corporate house having hierarchy in positions and chain of commands in them. Patron-client networks are defined by fluid interactions, and operate as smaller units within the overall network. In Nepal, both form of organized crime are in existence. Besides, a threat alarm to Nepal is growing networks without proper regulations.

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¹⁰ NKP 2067, D.N. 8321, p. 309.

¹¹ NKP 2074, D.N. 9889 p. 1681

¹² NKP 2071 D.N. 9164 p.....