ASCERTAINING THE FACTORS RESPONSIBLE FOR THE
PHENOMENON OF ORGANIZED CRIME IN CANADA AND INDIA

by

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ABSTRACT

This thesis ascertains the factors that are responsible for the phenomenon of organized crime in Canada and India and suggests necessary measures for combating the same. The thesis explores the concept of organized crime, its history, threat perception, experience of the two countries and analyzes the effectiveness and critique of the legislations adopted in the direction. The thesis also analyzes the whole scenario in Canada and India in order to determine the factors behind the phenomenon.

In the process, available literature as well as statistical data and information available on the web addresses of concerned governmental departments and agencies is reviewed to arrive at an understanding of the scenario from perspective of a developed and a developing country.

The thesis concludes that ineffective legislative measures coupled with corruption and the social reality that there is a market for illegal products is responsible for the phenomenon of organized crime in Canada and India. Moreover, overemphasis on legislative and enforcement measures has been ineffective as a solution for the problem.

The factors responsible for the phenomenon in the two countries can be classified into legislative inadequacies, societal preferences and secondary factors such as lack of study of political corruption, criminalization of politics, lack of political will, lack of research initiative in the area and abuse of provisions. Apart from overcoming the shortcomings of legislative measures, it is necessary to adopt a holistic approach to fight the phenomenon. The measures in the said direction include emphasis on preventive measures, creating public awareness to obligate public policy, overhauling of criminal justice system, revising and improving enforcement agencies’ training manuals, and revising the pay scales of police personnel.
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CHAPTER 1

INTRODUCTION

The issue of crime and criminality has always eluded a flawless solution in jurisdictions world over. The continued evolution of traditional forms of criminality has paved the way for far more complex, sophisticated and amalgamated forms of criminality referred to as organized crime. The phenomenon has acquired menacing proportions by transcending national boundaries and operating in collusion with criminal groups of varied nationalities.

The existence of this facet of criminality not only poses a grave threat to public health and safety but also undermines the economic and political stability of nations. In the light of the grave threat perception, this thesis explores the organized crime scenario in Canada and India, one being a developed and the other being a developing country. The thesis determines the factors responsible for the phenomenon in the two countries.

Accordingly, to begin with, this first chapter explores the very concept of organized crime, its history, threat perception and experiences of the two countries. After considering and recognizing the threat perception of the phenomenon, both the nations have attempted in vain to combat it by resorting to policy formulation and development of legislative responses. Chapter 2 examines these developments by analyzing critically the effectiveness of the legislation enacted in the two countries.

The factors responsible for the phenomenon encompass areas that are beyond the scope of organized crime legislation. In this direction and in the light of the fact that drugs trade is the largest source of revenue for organized criminal groups, chapter 3 establishes that overemphasis
on legislative and enforcement measures has been ineffective as a solution for the problem of the drugs trade that is in turn sustaining the larger phenomenon of organized crime.

In conclusion, chapter 4 ascertains that ineffective legislation coupled with factors such as corruption and the social reality that there is a market for illegal products are responsible for the phenomenon of organized crime in Canada and India. Finally, chapter 5 recommends necessary measures to combat the phenomenon of organized crime in the two countries.

The rest of this chapter provides a background to the problem of organized crime, examining its history, threat perception and the experience of the two countries in the light of literature and available sources.

**The problem of organized crime**

The phenomenon of organized crime can be described as the commission of crime by a union of criminals, who pool their resources and expertise under a hierarchical structure or under a loosely organized entity, for the purposes of economic or other gains. Although organized crime involves the commission of traditional crime, it is quite different from traditional forms of crime. The difference lies in the method and nature of operations undertaken by organized criminal groups and by traditional criminals. Moreover, the essential characteristics of organized crime (including hierarchical structure, durability over time, diversified interests, capital accumulation, reinvestment, access to political protection and use of violence to protect its interests) separate it from traditional crime.

The threat perception of organized crime in both the countries has increased many folds over the last quarter of century with the advent of information technology, globalization and subsequent opening up of world economies. Developments such as paper-less transactions (electronic transactions), electronic banking and minimal foreign exchange regulatory framework in the free
market environment are being employed by organized criminals to diversify their base of operations.

The academic study of organized crime has led to different definitions which have elaborated the concept and have enabled us to understand the phenomenon from different perspectives.

**Academic definitions of organized crime**

According to Margaret E. Beare:

“Organized crime is ongoing activity, involving a continuing criminal conspiracy, with a structure greater than any single member, with the potential for corruption and/or violence to facilitate the criminal process.”

This definition is quite exhaustive and incorporates all the necessary characteristics that separate organized crime from other traditional forms of crime. The characteristic features such as longevity, some form of structure and evasion of prosecution through use of corruption and violence have all been incorporated.

According to Donald Cressey, a sociologist:

“An organized crime is any crime committed by a person occupying, in an established division of labor, a position designed for the commission of crime, providing that such division of labor also includes at least one position for a corrupter, one position for a corruptee, and one position for an enforcer.”

According to Joseph Albinii:

“Any criminal activity involving two or more persons, specialized or non-specialized, encompassing some form of social structure, with some form of leadership, utilizing certain modes of operation, in which the ultimate purpose of the organization is found in the enterprises of the particular group.”

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3 *Ibid* at 33.
From the study of the above definitions the characteristics of organized crime groups can be enumerated as follows:

a. Organizational structure

The most essential characteristic of organized crime groups is the existence of a structure wherein all the members are assigned different roles and responsibilities by the top hierarchy. The functions of top hierarchy include planning, organizing, recruiting, directing and controlling towards accomplishment of ultimate goal of material benefit through commission of crime.

b. Durability over time

The operations and activities of organized crime groups span a considerable period of time. The durability factor plays an important role in distinguishing an organized crime group from traditional criminal groups. Usually such durability is achieved by evading prosecution through the means of corruption (including political corruption), use of threat/influence and violence.

c. Diversified interests

The scope of operations of organized crime groups is multidimensional and their involvement covers a wide array of criminal activities such as drug trafficking, extortion and money laundering. The organized crime groups venture into and capitalize every lucrative opportunity that presents itself.

The organized criminal groups are able to survive and thrive because of their above mentioned characteristics like organizational structure, durability over time, diversified interests and use of all means necessary to evade prosecution. The phenomenon can further be understood in the light of experiences of the two countries in order to ascertain its causes, similarities and differences.
Canadian experience

Historical aspect

In layman’s terminology, organized crime can be described as the carrying out of an illegal activity for the purpose of making profits. The origins of the problem can be traced back to the times when the first system of administration through the formation of government and laws came into being.\(^4\)

The earliest forms of organized crime ranged from piracy, smuggling, banditry, kidnapping and extortion.\(^5\) However, the Renaissance and early modern periods are said to be the golden age in the history of organized crime.\(^6\)

The phenomenon of organized crime in Canada can be traced back to 250 years before Confederation.\(^7\) The earliest organized criminals were involved in fur-trading until 1700 when fur-trading was made legal, the major pioneers of that period used to conduct their activities from New France.\(^8\) The brief timeline of organized crime in Canada can be summarized from the times of the coureurs de bois of pre-confederation, the bootlegging gangs that followed crews building the Canadian Pacific Railway, criminals like the Sundance Kid on the Outlaw Trail in southern Saskatchewan at the turn of the twentieth century, the bootleggers of Prohibition and, today, the cocaine cartels and the Hells Angels, with their acute interest in the shipping ports of Vancouver, Montreal and Halifax.\(^9\)

\(^5\) Ibid.
\(^6\) Ibid.
\(^8\) Ibid.
\(^9\) Ibid.
From the study of definitions of organized crime and the historical aspect it can be argued that the criminal activities that were performed in the 1700s had the same characteristic features as any modern day organized gang. However, today the phenomenon has grown into monstrous proportions, the Canadian criminal intelligence agencies have identified approximately 950 organized groups in 2007 as compared to an estimated 800 groups in 2006. The Canadian law enforcement agencies consider the Hells Angels motorcycle gang as the most powerful and well-structured criminal organization in Canada.

**Structure of organized crime groups in Canada**

The organized crime groups in Canada have varied organizational structures and capabilities ranging from highly structured hierarchical and familial organizations to loosely structured ones. Among these groups, only a small percentage is capable of realizing elaborate, diverse and complex criminal activities such as importation, manufacture and distribution of illicit commodities and involvement in frauds and money laundering. Such groups primarily operate from the metropolitan or largest urban areas with their secondary operations in smaller cities and rural areas. The penetration of organized criminal groups throughout the country has posed a serious threat to the law and order situation that can be understood by looking at the threat perception of these activities.

**Threat perception**

The threat posed by organized criminal groups can be understood by studying the different facets of criminality they are involved in and by looking into their effects on the society as a whole.

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12 Supra note 10.
13 Ibid.
- **Illicit drugs**

The cultivation and trafficking of marihuana represents the single most common and most lucrative activity that is being pursued by organized crime.\(^\text{14}\) The province of British Columbia in general and Vancouver in particular, a city that has earned the international reputation of being the narcotic capital of Canada, continues to have the highest number of marihuana grow operations in the county with reported incidents of marihuana growing operations (79 per 100,000 population) being nearly three times the national average (27 per 100,000 population).\(^\text{15}\) The greater Vancouver area is considered to be the leading cultivator of US-bound BC grown marihuana.\(^\text{16}\)

Organized crime in Ontario is also heavily involved in production and trafficking of marihuana, a large portion of which is used for export to other provinces, the United States and other foreign countries.\(^\text{17}\) Apart from marihuana, organized crime is also heavily involved in the distribution and sale of cocaine, production of methamphetamine and importation of heroin.\(^\text{18}\)

- **Money Laundering**

Money laundering is an essential component of organized crime as it enables legitimatization of proceeds of crime. The term was first coined to describe the methods employed by mafia gangs in the USA in 1930s to legitimatize their profits earned during the period of prohibition.\(^\text{19}\) The mafia gangs used their businesses of launderettes or dry-cleaning shops to convert their ill gotten money


\(^{15}\) Ibid.

\(^{16}\) Ibid.


\(^{18}\) Ibid.

into genuine profits of the business. The phenomenon can be said to have both national and international dimensions attached to it; however, it is the international dimension that has enabled the proliferation of money laundering with impunity. It has been estimated that 80% of all money laundering cases handled by the police in Canada have an international component.

Moreover, Canada is used by major money-laundering rings because of its positive economic attributes such as proximity to the U.S., stable economy, currency, and governments, and its sophisticated financial sector.

The liberalization and globalization of the majority of world economies has enabled the rapid movement of funds and capital without much restriction and this very factor has proved to be a shot in the arm for the money launderers. Moreover, the shell companies, shell corporations and shell banks located in offshore jurisdictions can be easily formed to transfer the funds under the garb of business operations which they seldom carry on.

The magnitude of the extent of the international dimension of money laundering can be gauged from the findings of the United Nations booklet entitled Financial Havens, Banking Secrecy and Money Laundering, according to which, “the offshore banking centres have more than 1 million anonymous corporations and the offshore centres have US$5,000 billion in assets, of which US$1,000 billion are in bank deposits and another US$4,000 billion are held in the form of stocks, bonds, real estate and commodities.”

According to another booklet entitled Information Technologies for the Control of Money Laundering, published by the Office of Technology Assessment, Congress of the United States,

20 Ibid.
21 Ibid at 92.
24 Supra note 19 at 94.
25 Supra note 19 at 99.
“in 1997 the extent of laundered funds being moved every day through wire transfers was estimated at US$300 million, 0.5-1 per cent of more than US$2 trillion being moved via around 700,000 wire transfers”\textsuperscript{26}.

According to the World Bank estimates, “money laundering today is an US$ 800 billion to US$ 1 trillion problem”.\textsuperscript{27} The phenomenon constituted between 2 percent to 5 percent of the world’s GDP in 1989, as appraised by the Managing Director of the International Monetary Fund in his address to the Financial Action Task Force.\textsuperscript{28} In Canada, “the federal government estimates that between $5 billion and $17 billion in criminal proceeds are laundered in this country each year”.\textsuperscript{29}

According to the G-7’s Financial Action Task Force, 1997-98 report, “approximately 70\% of the money laundered through Canada is derived from drug trafficking”.\textsuperscript{30} A wide array of methods and techniques are employed to launder money such as “through deposit-taking institutions, currency exchanges, the securities industry, real estate, incorporation and operation of shell companies, dealings in gold and precious metals, the insurance industry, gambling facilities (lotteries and casinos), automobile and boat dealerships, professionals (lawyers and accountants), and cross-border movement of illicit proceeds”.\textsuperscript{31} For the purposes of money laundering, “chartered banks are used more than all other laundering methods combined”.\textsuperscript{32} As per the United Nations estimates, earnings pertaining to organized crime (US$ 1.1 trillion per year) and narcotics trade (US$ 500-800 billion) is 8 to 10 percent of international trade.\textsuperscript{33}

\textsuperscript{26} \textit{Ibid.}
\textsuperscript{27} \textit{Supra} note 19 at 6.
\textsuperscript{28} \textit{Ibid.}
\textsuperscript{30} \textit{Ibid.}
\textsuperscript{31} \textit{Ibid.}
\textsuperscript{32} \textit{Supra} note 1 at 10.
\textsuperscript{33} \textit{Supra} note 19 at 51.
Information technology, e-commerce and organized crime

Broadly speaking, electronic commerce can be said to include all the activities relating to the sale and purchase of products carried on the internet or in cyberspace. The concept of cyberspace has been defined as “a consensual hallucination that felt and looked like a physical space but actually was a computer-generated construct representing abstract data”\textsuperscript{34} wherein people carried out all their routine activities. E-commerce has provided a whole new array of methods that are being utilized by money launderers to their end. This medium has enabled the launderers to place money through internet banking and through digital cash (smart cards/cash cards) without the involvement of banks. Furthermore, the process of layering of money and integrating the same has become easier as internet money can be passed through a greater number of jurisdictions to avoid detection.\textsuperscript{35}

Internet trading in securities is another well known modus operandi that is being employed by money launderers to provide an explanation for their income derived from proceeds of crime.\textsuperscript{36} To make matters worse, it now appears clear that money launderers are targeting financial institutions which do business on the Internet.\textsuperscript{37} Organized crime is employing this new tool to broaden its area of operations, especially Internet and e-mail fraud, and is hitting businesses across Canada.\textsuperscript{38} Scams such as the phony invoice ploy, identity theft, money laundering, phishing and advance fee scams have become part of organized crime operations worldwide.

In 2002, Canada (2.5 percent) was only second to the United States (92.9 percent) in the list of top three countries from which complaints had been registered by the Internet Fraud Complaint

\textsuperscript{34} Edward A. Cavazos and Gavino Morin, \textit{Cyber-Space and The Law} (The MIT Press, 1994).
\textsuperscript{35} \textit{Ibid}.
\textsuperscript{36} \textit{Ibid}.
Center and India (0.1 percent) was in the ninth spot amongst the top ten.\textsuperscript{39} In terms of the top ten countries from where perpetrators operated, Canada (3.5 percent) was third behind United States (76.5 percent) and Nigeria (5.1 percent).\textsuperscript{40} The extent of the menace is ever increasing owing to the broadening consumer base of internet users.

The number of cyber crimes dealt with by the RCMP has increased from 54 incidents in 1997 to 768 incidents in 2001.\textsuperscript{41} The most common cyber crime being reported was mischief in relation to data. The Ottawa Police Service’s High-Tech Crime Unit dealt with 143 cases of Internet-related crime in 2000 and 155 cases in 2001 and for the same year, the e-Crime Section of the Ontario Provincial Police received a total of 191 requests for service out of which 70 percent were related to the Internet.\textsuperscript{42}

In the light of present circumstances and the fact that the consumer base of internet services is ever broadening it would be right to conclude that the threat perception of organized crime’s involvement in cyberspace is immense and needs to be addressed urgently.

Organized crime groups survive and thrive at the cost of a peaceful and harmonious environment for societies. Often these groups resort to violent means in order to maintain or annex new areas of operation which leads to a prevalence of lawlessness and poses threats to societies at large.

i. Public safety

Irrespective of the scale of operations, it is arguable that no organized group can survive in isolation from society because it is society that provides the end consumers for their illegal products. Public safety is adversely affected as violent means are employed by organized crime

\textsuperscript{40} \textit{Ibid}.
\textsuperscript{41} \textit{Ibid} at 22.
\textsuperscript{42} \textit{Ibid} at 23.
groups to keep the monopoly on their turfs. These violent confrontations often involve use of illegal firearms and at times bystanders or innocent individuals become casualties in the cross fire.\textsuperscript{43} This angle can further be probed by looking into the areas of organized criminal activity.

- Illicit drugs

The illicit drug traders account for more criminal activity than any other facet of criminality (including assaults, homicides and property crimes), and apart from these traders, members of society who are addicted to the substance abuse also indulge in criminal activities to support their addiction.\textsuperscript{44} The street gangs engaged in criminal behaviour, especially drug trafficking, use violence as a primary tool to achieve their objectives, and this tendency to use violence as a means of establishing power and influence often results in victimization of innocent bystanders. The city of Toronto experienced 52 homicides involving firearms in the summer of 2005 alone; a general upward trend in gun related violence that appears to be fuelled by street gangs.\textsuperscript{45} Public safety is adversely affected by the activities of these street gangs that have a nexus with illicit drugs traders. Apart from illicit drug traders, samples of illicit drug users in Canada have shown that 60-77 percent of users reported criminal activity as a major or secondary source of income.\textsuperscript{46}

- Human trafficking and smuggling

According to the United Nations, human trafficking and migrant smuggling have emerged to be two of the fastest growing areas of international criminal activity, and in global context they are the third largest source of revenues for organized crime, after drugs and arms trafficking.\textsuperscript{47}

\textsuperscript{43} Supra note 33.
\textsuperscript{44} Ibid.
\textsuperscript{45} Supra note 17.
\textsuperscript{46} Andrew M. Jones, The Elgar Companion to Health Economics (Edward Elgar Publishing, 2006) at 85.
According to the United States-Canada Bi-National Assessment of Trafficking in Persons, “The predominant difference between human smuggling and TIP (Trafficking in Persons) is that TIP involves the use of threats, force, coercion or fraud resulting in the conditions of servitude, slavery or sexual exploitation” which results in individuals being sneaked into Canadian territory illegally without the verification of antecedents and undergoing immigration procedures. These illegal migrants work illegally in order to survive and are prone to indulge in illegal activities detrimental to public safety. According to the 1998 Organized Crime Impact Study commissioned by the Solicitor General of Canada, as many as 16,000 people are smuggled into Canada each year.

Apart from affecting public safety, facets of organized criminal activity such as the illicit drug trade adversely affect the health of the members of society.

**ii. Public health**

It is arguable that the health and vitality of the members of society is seriously affected by the proliferation in activities such as illicit drugs that can be attributed to the involvement of organized criminal groups.

- **Illicit drugs**

The use of drugs affects the most productive work force of a nation, producing uncertainty not only for the present but also for the future. The Canadian illegal drugs market is worth between $7-10 billion each year, comprising of marihuana, heroin and crack cocaine as the major illicit drugs. The adverse effects of illicit drug use include the spread of HIV, infectious diseases, drug

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48 Ibid.
49 Supra note 4 at 140.
50 Ibid.
addiction and prenatal developmental problems.\textsuperscript{52} The illegal marihuana growing operations pose grave health hazards to the surrounding community. The activity involves numerous fire threats owing to exposed live wires and use of volatile chemicals and results in a prevalence of high levels of moulds and pollens that can cause respiratory health problems and allergies such as asthma amongst the persons exposed to such environment.\textsuperscript{53} Moreover, the use of hydroponics technology has enabled growers to plant large quantities of high-quality marihuana indoors.\textsuperscript{54}

Furthermore, injection drug use has emerged as an important risk factor for HIV/AIDS and hepatitis C in Canadian cities, particularly Vancouver, Toronto and Montreal. One 1996 study done in Vancouver suggests an HIV seroprevalence of 25\% and a hepatitis C seroprevalence of 85\% among 700 individuals tested. A 1997 study estimates that Vancouver alone has an injection drug user population of between 5000 and 15000.\textsuperscript{55} Moreover, more than 45 percent of new HIV infections in Canada are related to unsafe injection of drugs, with Vancouver having the highest incidence of HIV injection users in the Western World.\textsuperscript{56}

The data of the 2006 Canadian-U.S Organized Crime Threat Assessment indicates that the problem of marihuana is particularly serious in British Columbia, Ontario and Quebec. On the contrary recent major seizures in rural parts of the Maritime Provinces suggest that the menace is not really confined only to specific regions.\textsuperscript{57} Apart from marihuana, synthetic drug production and trafficking in Canada has touched new highs which can be attributed to the increased involvement of major crime networks, according to the 2004 RCMP Drug Situation Report.\textsuperscript{58}

\textsuperscript{52} Supra note 10.
\textsuperscript{53} Ibid.
\textsuperscript{54} Glen R. Hanson, Peter J. Venturelli and Annette E. Fleckenstein, \textit{Drugs and Society} (Jones & Bartlett Publishers, 2005) at 20.
\textsuperscript{57} Supra note 47.
\textsuperscript{58} Ibid.
- **Consumer pattern of illicit drugs**

Amongst illicit drugs, cannabis is the most popular among Canadians with 7.4% of the population 15 years of age or older reporting using the drug at least once in the past year.\(^{59}\) Cocaine is the second most popular illicit drug with approximately 1% reporting consumption in the past year. Only 0.5% of Canadians had used heroin at least once. The pattern of drug use is also reflected in the pattern of crimes; in 1993, offences involving cannabis accounted for 63% of all drug related offences while cocaine and heroin accounted for 22% and 2.8% respectively.\(^{60}\)

**Outlook indicators**

It is worth noting that the production of illicit drugs continues to rise despite record seizures worldwide. A Canadian study indicated that in 1995 crack use among adolescent students increased significantly from 0.5% in 1993 to 1.9%; in 1985, Canadian marihuana comprised only 10% of total Canadian availability of the drugs which grew to 50% by 1995.\(^{61}\) The indicators clearly point to increased production of illicit drugs that is detrimental to public health as well as fuelling the organized criminal activity.

- **Targeting of vulnerable groups**

According to a 1997 epidemiology study, the reported cocaine usage rates among street youth in Canada ranged from a low of 31% in Toronto to a high of 85% in Vancouver with usage rates of 2-4% in general amongst Canadian adolescents.\(^{62}\) This trend of drug usage amongst youth illustrates the gravity of the problem. Apart from affecting the health of the users, the trade related with drugs affects the whole economy given the high cost of enforcement measures to contain the drugs trade.

\(^{59}\) *Supra* note 55.  
\(^{60}\) *Ibid.*  
iii. Economic consequences

The economic impact of various organized criminal activities can be illustrated by looking into each facet of organized criminality and its associated cost to the national economy.

- Illicit drugs

According to the R.C.M.P., the illicit drug transactions “involve so much money that the cash is weighed instead of being counted because it is quicker and discrepancies can be written off as the price of doing business”.63 It is worth noting that studies attempting to quantify, in dollar terms, the cost imposed by illicit drugs on Canada range from conservative estimates of $1.4 billion per year to cost estimates close to $4 billion per year for just the three most populous provinces of Québec, Ontario and British Columbia.64

According to the 2004 RCMP Drug Situation Report, Marihuana grow operations (MGOs) along with trafficking and consumption of marihuana is on an upward trend across Canada and efforts to curtail this trend continue to tax all drug enforcement resources.65

- Economic crime

The bulk of major economic crimes are committed by non-traditional organized crime groups such as Russian organized criminal groups or by two or more corrupt business people that typically have no connection with traditional organized crime groups. The Russian mafia groups are primarily found in Ontario, British Columbia, and Quebec and have been involved in the manufacture and use of counterfeit currency and false identification documents, and have organized shoplifting and large-scale theft of consumer goods that are shipped to Russia and

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63 Supra note 22 at 238.
64 Supra note 55.
65 Supra note 10.
Moreover, Russian organized criminal groups are also involved in organized vehicle theft as cars exported to Russia can be sold for twice their value back at home. The involvement of these groups and the economic impact of these activities can be ascertained through the study of the following table.

<table>
<thead>
<tr>
<th>Type of economic crime</th>
<th>Year</th>
<th>Estimated cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Insurance fraud</td>
<td>1996</td>
<td>$1-2.5 billion</td>
</tr>
<tr>
<td>Cellular phone fraud</td>
<td>1995</td>
<td>$650 million</td>
</tr>
<tr>
<td>Credit card fraud</td>
<td>1997</td>
<td>$127 million</td>
</tr>
<tr>
<td>Stock market fraud</td>
<td>1997</td>
<td>&gt;$3 billion</td>
</tr>
<tr>
<td>Telemarketing fraud</td>
<td>1997</td>
<td>$4 billion</td>
</tr>
<tr>
<td>Motive fuel fraud</td>
<td>1996</td>
<td>$55 million</td>
</tr>
</tbody>
</table>

- **Counterfeit products**

Organized crime has diversified with changing times to venture into counterfeit products including piracy of computer software. According to the Canadian Alliance Against Software Theft (CAAST), in 1996 software piracy in Canada resulted in costs of over $500 million to legitimate producers.

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66 Supra note 11 at 82.
68 Supra note 55.
69 Ibid.
- **Motor Vehicle Theft (MVT)**

The involvement of organized crime in motor vehicle theft has resulted in ever increasing insurance premiums. According to the Insurance Crime Prevention Bureau (ICPB) in 1996, 74% of vehicles stolen in Canada were recovered, a decrease from 79% in 1995 (Ontario’s recovery rate currently stands at 74% which is down from 80-85% while Quebec has the worst recovery rate in Canada at 68%).\(^{70}\)

Moreover, the Canadian insurance industry reports that MVT costed Canadian insurers $500 million in 1995 and $600 million in 1996 (the average amount paid by a motorist in his or her premium to cover theft claims of all insured vehicles is now approximately $43.00 or more than what it costed in 1995).\(^{71}\)

- **Financial crime**

It is arguable that the involvement of organized crime in financial crimes such as payment card frauds has a huge economic bearing on the industry and financial institutions including banks, credit unions and mortgage insurers. Individuals and investors are affected as result of mass marketing schemes such as telemarketing frauds and securities fraud (the securities fraud and telemarketing scams alone costs Canadians at least $5 billion each year).\(^{72}\) According to the Insurance Bureau of Canada, insurance fraud continues to cost more than a billion dollars annually through insurance premiums with $541.9 million annually in vehicle theft related insurance costs.\(^{73}\)

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\(^{70}\) *Ibid.*

\(^{71}\) *Ibid.*

\(^{72}\) *Supra* note 4.

\(^{73}\) *Ibid.*
- **Money Laundering**

Highly capable organized groups resort to laundering and investing their income in legitimate companies that can have the consequence of undermining of the legitimate economy.\(^ {74}\) According to the 1998 Organized Crime Impact Study, between $5 billion to $17 billion is laundered each year in Canada.\(^ {75}\) Money laundering can trigger a chain reaction at the international level among financial institutions such as banks, currency exchanges, securities traders and insurance companies resulting in loss of investors’ public confidence.\(^ {76}\)

- **Loss of tax revenue**

The existence of a contraband market, wherein contraband products are sold at significantly lower prices, causes huge losses to potential tax revenue of the state.\(^ {77}\) The sale of counterfeit products undermines the profits of legitimate industry as well as tax revenue of the government.\(^ {78}\) The counterfeiting of clothes and pharmaceuticals may cost Canadians more than $1 billion each year and the illegal smuggling of tobacco, alcohol and jewellery can result in tax losses of up to $1.5 billion.\(^ {79}\)

The Canadian experience with organized criminal groups clearly illustrates the need for a comprehensive review of the legal treatment and policy that has been adopted to combat organized crime. The Indian experience will now be examined to understand the phenomenon from a developing country’s perspective.

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\(^ {74}\) *Supra* note 10.

\(^ {75}\) *Supra* note 47.

\(^ {76}\) *Supra* note 10.

\(^ {77}\) *Ibid.*

\(^ {78}\) *Ibid.*

\(^ {79}\) *Supra* note 47.
Indian experience

Historical aspect

The phenomenon and concept of organized crime is relatively new to the Indian context. However, it would be wrong to infer that the criminal activities having characteristic features quite similar to modern day organized crime were altogether absent from the society. In historical perspective such criminal activities had existed and were largely confined to thuggee and banditry. Thuggee was committed by a “fraternity of ritual stranglers who preyed on travellers along the highways of nineteenth century India”\textsuperscript{80} and dacoity was prevalent throughout all the times in Indian history.\textsuperscript{81} Apart from them, petty offences were largely committed by the members of identified criminal communities or castes.

These traditional or conventional forms of crime were highly organized and had considerable longevity of operations. In the 1800s and during the first half of the 19\textsuperscript{th} century these forms of crime were relatively less diversified and simple in structure than the pattern that was witnessed in the second half of the 19\textsuperscript{th} century. These forms can be further elaborated as below:

- **Thuggee**

The modus operandi of thugs or the persons who committed thuggee revolved around deceiving their unsuspecting victims into joining the other thugs who would pose as bonafide travellers and thereafter killing by strangulation and burying the victim at some secluded place for the purpose of plundering the victim’s belongings.\textsuperscript{82} The British authorities in India came across the existence of thuggee in 1807 in Southern India and in 1809 in Northern India.\textsuperscript{83} The problem was dealt with

\begin{footnotesize}
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\item\textsuperscript{80} Kim A. Wagner, *Thuggee: Banditry and the British in Early Nineteenth-Century India* (Palgrave Macmillan, 2007) at 1.
\item\textsuperscript{81} R.G. Singh, *Sociology of Deviance* (Jainsons Publications, 1985) at iii.
\item\textsuperscript{82} *Supra* note 80.
\item\textsuperscript{83} *Supra* note 80 at 7.
\end{itemize}
\end{footnotesize}
firmly through the adoption of strict legislative and police measures. The result was the demise of thuggee from India by 1839.\textsuperscript{84} 

- **Dacoity**

The phenomenon of dacoity has plagued India and particularly the Central India for almost one thousand years.\textsuperscript{85} The timeline in the history of banditry in Central India can be traced back to the twelfth century when King Anangpal Tomar was uprooted from the city of Delhi by his cousin Prithviraj Chauhan and had to take refuge in the ravines.\textsuperscript{86} He replenished his resources and from here mounted in vain several attacks to regain his territory.\textsuperscript{87} In the sixteenth century the throne of Delhi was captured by the Moghuls who were Muslims and this region of central India served as a refuge and as a buffer zone between Muslim powers in North India and Hindu Kingdoms in South India.\textsuperscript{88}

The phenomenon of banditry survived the stringent measures adopted under the British rule and continued to plague Central India until early 1980s. The most well known and dreaded dacoit of recent times had been Phoolan Devi, also known as bandit queen, who surrendered along with her ranks in February, 1983.\textsuperscript{89} The crime scenario in India witnessed a transition after this period.

During the period of 1990s, the Indian economy was liberalised through the formulation of LPG or liberalisation, privatisation and globalisation policy. Owing to a sudden boom in the economy and sky rocketing of office space and land prices, the land mafia came in the picture in almost all the metropolitan cities and their surrounding areas. The land mafia enjoys the patronage of their political masters and is involved in land grabbing, intimidation and forcible vacation of disputed

\textsuperscript{84} Supra note 80. 
\textsuperscript{85} Supra note 81. 
\textsuperscript{86} Mala Sen, *India’s Bandit Queen* (Pandora, 1991) at XX in introduction. 
\textsuperscript{87} Ibid. 
\textsuperscript{88} Ibid at Xxi in introduction. 
\textsuperscript{89} Ibid at 1.
Furthermore, the emergence of the information technology sector as a major source of foreign revenue accelerated the pace of construction in metropolitan cities that provided even more conducive conditions for the land mafia to spread its tentacles further.  

At present, Mumbai (formerly known as Bombay), the financial and commercial capital of India, is most affected by the phenomenon of organized crime. In the post-independence period i.e. beginning from 1947, the gang of Varadharaj Mudaliar involved in illicit liquor, gold smuggling, gambling, extortion and contract murders was the first major identified organized gang. The gang was operational in the early sixties and was followed by the gangs of Haji Mastan, Yusuf Patel and Karim Lala (the first two gangs were involved in the smuggling of gold while the third gang was involved in drugs). All these gangs exploited the city’s proximity to ports and the Arabian Sea for pursuing their activities.

Another reason for Mumbai becoming the hotbed of organized crime can be attributed to the presence of the Indian film industry. The revenue generated from the industry is huge; with estimated revenues of $1.75 billion for 2006 that are projected to touch $3.4 billion in the next three years. The Indian film industry based in Mumbai is twice the size of Hollywood with global fan following of a successful production being anything up to 3.2 billion worldwide. The film production was not recognized as an industry by the government despite of the fact that it made the highest number of films in the world and dealt mostly in hard cash, most of which involved black or illegitimate money. The non recognition of such a high revenue generating industry and the associated need of financing created a vacuum which was filled by organised crime.

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91 Ibid.
92 Ibid.
93 Ibid.
criminal groups. The groups financed the producers, who were otherwise unable to secure financing from banks or financial institutions, with the confidence that they can recover the money under all circumstances through force and threat.96

The organized crime and bollywood connection was debated for a long time but the real breakthrough came in 2001 with the arrest of the industry’s biggest financer and immensely wealthy diamond merchant named Bharat Shah. He was arrested by Mumbai police on the charges of helping gangsters to extort money from others in the film industry.97 According to the Gem and Jewellery Export Promotion Council, he has exported more than $1 billion worth of diamonds during the past decade.98

Apart from Mumbai, the phenomenon can also be found in other cities, but to a lesser extent. Ahmedabad, the capital city of the Gujarat state, is plagued with a liquor mafia owing to the prohibition that is in effect in the state.99 The bootlegging operations were monopolised by a gangster named Latif who started his operations in the mid seventies and broadened his base with the help of his two hundred henchmen.100

At this stage, after having being acquainted with the problem, it becomes necessary to look into the threat perception of the phenomenon in order to ascertain the extent and magnitude of the problem.

98 Ibid.
99 Supra note 90.
100 Ibid.
Threat perception

Organized crime in India is slowly and steadily increasing its area of influence from predominantly urban port cities to even the remotest of places. These activities not only affect a particular society or a country but experience has shown that they also are connected to the phenomenon of global terrorism.

i. Public safety

It is arguable that ordinary citizens are the first and the foremost to be effected by the violent means of organized crime syndicates. The most glaring example of this phenomenon is the Mumbai serial blasts that were carried out in 1993 on the instructions of Mumbai’s underworld don Dawood Ibrahim, whose Dawood Gang is currently the most powerful organized crime group in South Asia.\(^{101}\) The blasts were carried out in retaliation of the riots that broke out after a mosque was torn down by Hindu fundamentalists.\(^{102}\)

In these serial blasts a total of 13 explosions took place within minutes of each other, due to which 257 persons died and 713 were injured.\(^{103}\) The subsequent trial of suspects took 13 years culminating with 100 convictions, of which 12 were death sentences and 20 life imprisonments, and 23 acquittals.\(^{104}\)

- Global terrorism

It is pertinent to mention here that the underworld don Dawood Ibrahim who was the mastermind behind these blasts is still at large and has been declared as a “global terrorist” by the United

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\(^{103}\) *Ibid.*

\(^{104}\) *Ibid.*
States Treasury Department. Aside from the September 11th, 2001 incident, Dawood Ibrahim is responsible for the greatest act of terrorism in the world i.e. the Bombay (Mumbai) serial blasts of 1993. Both Osama Bin Laden and Dawood Ibrahim have been designated as “global terrorists” by the United States Treasury Department and it is interesting to note that Osama Bin Laden turned to Dawood Ibrahim’s help for evading U.S. forces in Afghanistan. Dawood Ibrahim reportedly negotiated a financial agreement that enabled Bin Laden to evade U.S. forces through use of his extensive smuggling routes along the Pakistani/Afghan border. At this stage it is also pertinent to mention that “Dawood Ibrahim controls the largest drug smuggling routes in an area that produces more than 75 percent of the world’s heroin”. He is wanted by India for his mastermind role in Bombay blasts and also by the U.S. for his al-Qaeda connections.

Moreover, India has reported that terrorist groups, apart from their direct involvement in criminal activities, are also known to work with organized crime gangs for the movement of men, arms and terrorist hardware at global level. They make extensive use of the networks of organized criminal gangs, particularly those relating to smuggling and to informal banking systems such as the hawala. It can be argued that underworld activities have started transcending national boundaries and are colluding with terrorist outfits to increase their profitability and magnitude. The worst affected party by this alliance is the public at large that has become ever so vulnerable.

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107 Ibid at 4.
108 Ibid.
109 Ibid at 6-7.
111 Ibid at 9.
- **Arms trafficking**

The organized crime syndicates in India are also involved in arms trafficking that risk the public safety. In 1993, consignments of AK-56 rifles, magazines, live rounds, hand grenades and RDX explosives were smuggled by sea route to cause blasts later that year in Mumbai.\textsuperscript{112} During the investigation of the 1993 blasts, authorities recovered 62 AK-56 rifles, 280 magazines, 38,888 rounds, 12 pistols of 9mm caliber with ammunition, 2313 kilo grams of RDX and 1100 electronic detonators.\textsuperscript{113}

Furthermore, the trend was repeated in 1996 when a case involving arms trafficking through air created a furore in the country. In this case an Antonov 26 aircraft air dropped its cargo (300 AK-47 and AK-56 rifles, 2045 rounds of ammunition, dragov sniper rifles, rocket launchers and night vision devices) over a village named Purulia in the state of West Bengal.\textsuperscript{114} It could not be ascertained as to who were the likely recipients of the cargo, but one thing was clear; the cache was meant to be used to cause havoc and destruction on an immense scale.

**ii. Public health**

Every nation requires able, disease free and contributing citizens but it is arguable that the single biggest factor ruining the health and character of people is drug addiction. The role of organized criminal groups in the illicit drug trade is obvious as it fetches them most of their revenue. The direct effect of organised crime’s involvement in illicit drugs trade upon public health can be understood by looking into the consequences of drug consumption.

\textsuperscript{112} *Supra* note 90. 
\textsuperscript{113} *Ibid.*  
\textsuperscript{114} *Ibid.*
- Illicit drugs

It is worth noting that India has been named as one of the 20 major hubs for trafficking in illegal drugs. The problem can be attributed partly to the geographical location of the country between the peripheral region of the Golden Triangle and Golden Crescent countries. This factor is fully exploited by organized criminal groups to procure and feed the national and international demand. The golden triangle countries (Laos, Thailand, and Myanmar) produce five percent of the world’s opium, with Myanmar having the dubious distinction of being the world’s second largest opium poppy grower. In addition, the golden crescent or Afghanistan (to the northwest of India) accounts for 90 percent of the world’s total production of opium. This proximity to major drug producing countries makes it convenient for organized criminals to flourish in India.

Moreover, the Indian pharmaceutical industry is the world’s largest producer of illegal mandrax (the commercial name of the depressant drug methaqualone, whose legal use as a sedative ended in 1980s). Apart from that, India is also the world’s largest legal grower of opium poppies out of which 10 to 30 percent of production is diverted into the manufacture of illegal heroin. It is a well-established fact that health implications of drug abuse include physical and psychological effects that render the user unfit for any productive activity.

The consequences of drug abuse in India have become even more damaging with the coming of injected drugs. The most commonly injected drugs in India are Heroin, buprenorphine

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116 Ibid.
118 “Heroin”, online: Interpol-Drugs sub-directorate <http://www.interpol.int/Public/Drugs/heroin/default.asp>.
120 Ibid.
(Tidigesic/Tamgesic) and dextropropoxyphene (Spasmo-proxyvon). The practice of injecting these drugs through shared needles makes the users potentially vulnerable to HIV/AIDS and other diseases. According to the National AIDS Control Organisation (NACO), there were an estimated 5.1 million HIV-infected persons in 2003 and India has the second highest prevalence of HIV of any country in the world, with an estimated 5.1 million people carrying the virus.

There has been a tremendous rise in the spread of HIV among IDUs (Injecting Drug Users). For instance, in the north-eastern state of Manipur in India, the first seropositive drug injector was detected in October 1989 and within six months, the prevalence rate had increased from zero percent to 56 percent. The rate at which HIV is spreading among injection drug users is detrimental to both public health as well as economic health of a nation.

iii. Economic consequences

Organized criminal activities severely affect the economic health of a state by siphoning off legitimate revenues and taxes that could have been earned by the state exchequer. The extent of economic damage can be probed by looking into various facets of organized criminality.

- Counterfeit products

According to a survey conducted by the FICCI (Federation of Indian Chambers of Commerce and Industry), counterfeiting causes an estimated loss of around Rs. 1,000 crore a year (Canadian $254,419,215 @ 1 Indian Rupee = 0.0254419 Canadian $). The Indian pharmaceutical
companies have estimated that one in five medicines sold in major cities is a fake, causing annual loss of 4-5% of revenues.\textsuperscript{126}

- **Money Laundering**

In India, the ill-gotten money from drugs trade is laundered through ARSs (Alternative Remittance Systems).\textsuperscript{127} According to the International Monetary Fund (IMF), the estimated total of criminal economy stands at US $500 billion per year, however it cannot be ascertained as to what portion of that economy is laundered through alternative remittance systems (also known by the names of “Hawala” or “Hundi” in India).\textsuperscript{128} The problem of money laundering could play havoc with the developing economy and undermine the stability of the state.

There is no doubt that the phenomenon of organized crime is comparatively new and limited to certain parts of India. However, considering the threat perception and the rate at which the phenomenon is spreading its tentacles, it will not be long before it escalates to a nation wide phenomenon.

It can be inferred from the analysis of organized crime and its continued threat perception that the phenomenon is proliferating inspite of the measures adopted to contain it. In the light of these facts, it becomes very necessary to ascertain the factors that are hindering the way of more effective measures and are responsible for the proliferation of the phenomenon in the two countries.


\textsuperscript{128} Ibid.
Factors hindering the way of more effective legislative measures

The factors responsible in the context of Canada and India can be summarized as below:

I. Factors hindering the way of more effective legislative measures in Canadian context

a. Lack of study of political corruption

Although the Canadian political scene may seem comparatively tidy in terms of corruption scandals, but it can be argued that this is partly because of lack of study of political corruption. It has been argued by Kenneth M. Gibbons, in the chapter titled “Study of Political Corruption” of his book, that the “study of political corruption has been woefully neglected”.129 Political corruption has the potential of causing dereliction of duties and obligations (which also include enacting laws) that are supposed to be performed by the elected representatives in public interest.

According to Arnold Heidenheimer:

“Political corruption has never been central to the discipline of political science or the related social sciences. This lack of scholarly consideration has left the investigation of political corruption to journalistic and other purely descriptive or impressionistic writers”130

It is pertinent to mention here that a similar conclusion has been drawn by K. Z. Paltiel in his study of party finance as a central element of political corruption in the Canadian context.131 Another form of political corruption is criminal political corruption that constitutes “any improper conduct on the part of political actors which involves criminals as the second actor. The conduct

129 Kenneth M. Gibbons and Donald C. Rowat, Political Corruption in Canada: Cases, Causes and Cures (Toronto: Carleton Library, 1976) at 1.
130 Ibid at 2.
131 Ibid.
may involve bribery, graft, influence peddling or other forms of corruption but the focal point remains with the involvement of criminal actors.”

It is arguable that these forms of political corruption may impede any bonafide legislative effort towards containment of crime in general and organized crime in particular. Political corruption can lead to a hand in glove relationship between the criminals and politicians, due to which the interests of both the parties can become common and interdependent. This relationship of convenience can prevent the politicians from enacting effective legislative measures. Hence, it can be argued that the field of political corruption cannot be ignored and this angle needs to be probed when seeking an effective solution to the problem of organized crime.

b. Charter challenges

The provisions of the Canadian Charter of Rights and Freedoms (the “Charter”) are essential for protecting an individual against the state excesses. However at the same time, these explicit constitutional provisions present a very daunting limit for legislators seeking to enact effective crime-control legislation. While drafting a piece of legislation the legislators have to ensure among other considerations that the provisions do not transcend the rights granted under the Charter. The slightest over breadth of legislation can lead to questions of constitutional validity on grounds of being violative of Charter provisions. It is arguable that due to Charter limitations legislation so enacted could well be ineffective. Moreover, the Charter provisions can be exploited and manipulated by organized criminals to evade prosecution. The technicalities of the Charter can be used to challenge even the minor discrepancies occurring during the apprehension or investigation stage. There is no doubt about the quintessence of Charter rights in a free society but in the light of the above discussion they can hinder the enactment of more effective legislative measures. The same can be suggested for the law enforcement in Canada that operates under

\[132\] Ibid at 3.
significant constitutional constraints. In this regard it has been argued that, “the fact is that they (Charter provisions) have served to place some limitations on the powers of law enforcement, and the police will argue that this affects combating organized crime, perhaps more than some other targets of law enforcement.”

Although there can be no valid point in questioning the quintessential nature of Charter provisions but it is arguable that in practical situations their applicability can be used by the perpetrators to their advantage.

After having analyzed the factors hindering the way of more effective legislative measures in Canadian context, the chapter will now look into the factors responsible in the Indian context.

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133 Margaret E. Beare and Stephen Schneider, Money Laundering in Canada: Chasing Dirty and Dangerous Dollars (University of Toronto Press, 2007) at 191.
II. Factors hindering the way of more effective legislative measures in the Indian context

a. Criminalization of politics and lack of political will

It is arguable that the monetary resources in the form of party funding and muscle power have become essential for success in the Indian political arena. A fairly common observation of commentators is that “in the past criminals and musclemen were used by politicians; now the criminals themselves have joined the ranks of politicians.”\(^{134}\) The relationship so formed is convenient and mutually beneficial. Organised crime in India has discovered the advantages and opportunities coming with political power as political mandate offers immunity from prosecution and also open access to public funds.\(^{135}\)

The situation has become so grim that there is no political party today that does not harbour a number of criminals holding party and even legislative/ministerial posts.\(^{136}\) It is pertinent to mention here that nearly a quarter of all federal MPs are subject to investigation ranging from embezzlement to bank robbery, taking of hostages, murder and rape.\(^{137}\) Everyday newspapers carry news about newer and newer dimensions of criminalization of politics and politicization of criminals.\(^{138}\) In a recent incident, a Member of Parliament was charged for his direct involvement in a human trafficking case. The Member of Parliament was apprehended at New Delhi’s international airport as he was about to leave for Toronto along with a woman and child posing as his own wife and son.\(^{139}\) The MP was using the diplomatic passports of his real wife and son to

\(^{136}\) *Supra* note 134.
\(^{137}\) *Supra* note 135.

smuggle them. The incident clearly points to the extent of degradation that has crept in to the organ of legislature.

In such an environment honest politicians find it very difficult to survive whereas politicians with criminal antecedents thrive\textsuperscript{140} at the cost of good governance. The state of affairs of legislature in India can be well imagined with legislators having criminal interests at the helm of affairs. It is quite evident that such legislators will shrug off their responsibility to enact effective legislation, and to take other necessary measures towards containment of crime in general and of organised crime in particular. This factor is further elaborated in the concluding chapter of the thesis.

b. Lack of research initiative in the area

The authorities have not taken the threat perception of the phenomenon of organised crime seriously in spite of its ever increasing presence. This is quite evident from the fact that out of a total of twenty eight states of India, only four states have felt the need to enact legislation pertaining to organized crime. It is pertinent to mention here that no central/federal legislation dealing directly with organised crime has been enacted in India.

The \textit{Prevention of Money Laundering Act, 2002} has been the only central/federal legislation that has been enacted for combating money laundering aspect of organised crime. Interestingly, this piece of legislation was enacted only because of the compulsion of a Political Declaration adopted by the Special Session of the United Nations General Assembly held on 8th to 10th June, 1998 wherein the member states were called upon to adopt national money laundering legislation and programmes. Apart from that there has been no independent research initiated on this point.

\footnote{\textsuperscript{140} Ramesh Kumar, \textit{Standardization Key To Social Reforms} (Atlantic Publishers and Distributors, 2007) at 82.}
c. Abuse of provisions

In India, the role of police authorities has often come under scrutiny for gross human rights violations, wrongful incarcerations and illegal confinement under the garb of law enforcement. The Terrorist and Disruptive Activities Act is a glaring example of how strict legislative measures were misused by the police authorities, under the instructions of government, against the trade unions, minorities and political opponents.\(^{141}\) The sheer abuse of the said act can be demonstrated from the fact that during its period of operation from 1987 to 1995, over 76,000 people were arrested whereas the conviction rate was less than one percent.\(^{142}\) This factor is one of the most important factors that are hindering the way of more effective legislative measures in India as incorporation of potent provisions has to be compromised because of likely abuse of the same.

Similarities and differences in organized crime scenarios

The most astonishing aspect about the phenomenon of organised crime is its universal character and its ability to adapt and influence the authorities to evade prosecution. The menace is surviving and thriving in Canada as well as in India irrespective of the fact that one is a developed country possessing ample resources and the other a developing one with a paucity of resources. Considering the contrastingly different socio-economic and political environments in the two countries, it becomes necessary to ascertain the factors that are responsible for the existence of a common phenomenon.

The phenomenon of organized crime is prevalent in varied proportions throughout Canada, primarily in the form of illicit drugs, money laundering and economic offences. In India, the menace of organised crime is primarily prevalent in Mumbai (formerly Bombay). However, the menace is slowing spreading its tentacles into the national capital region of New Delhi, the


\(^{142}\) Ibid.
information technology hub of Bangalore, and other developing cities across the lengths and breadths of the country.

Interestingly, the factors responsible for the proliferation of the menace in both the countries are quite similar which can be enumerated as below:

a. Corruption

It is highly improbable to believe that organized crime syndicates are operating with impunity and are being successful in impeding state efforts to eradicate them without the connivance of a few corrupt officials. The United Nations Convention against Transnational Organized Crime (UNTOC), to which both Canada and India are signatories\(^\text{143}\), recognizes that, “corruption is an integral component of transnational organised crime and must be addressed as part of efforts to combat organised crime.”\(^\text{144}\) Organized crime is undermining the state machinery, resources and public exchequer through corruption.

Furthermore, the United Nations Convention against Corruption has expressed concerns over the links between corruption and other forms of crime, particularly organized crime and economic crime including money laundering.\(^\text{145}\) The corruption is used to influence:

i. a police officer for ignoring illegal activity, evading arrest, destroying evidence, preparing a favourable investigation report.

ii. a public prosecutor to weaken the prosecution case, not to subject the witnesses to thorough and revealing cross examinations, ignoring vital aspects while drafting and


to abuse the provisions of law by filing unnecessary applications, adjournments to gain time.

iii. a judicial officer to deliver favourable judgments by ignoring the merits of a case.

iv. a legislator in order to oppose any unfavourable piece of bill, meticulously bypassing or ignoring the incorporation of material provisions of a bill into legislation and to influence executive and judiciary.

v. a civil servant for dereliction of duties including ignoring law and order situation and ignoring state of affairs of the administrative setup.

It is arguable that human greed for money and a culture of materialism acts as prime motivations for indulging in corrupt practices. The greed has no contentment which furthers one’s degree of indulgence in corrupt practices.

b. Rising election expenditures

There is a direct relationship between the expenditure incurred on election canvassing and securing votes. According to the spatial theory of electoral competition, the candidates are seen as offering a package of issues and promises to voters and it is envisaged that the candidate with the most appealing package gains the confidence of voters.\textsuperscript{146} The canvassing or campaigning expenditure enables a candidate to make his platform known to voters through personal contact or mass media.\textsuperscript{147} The expenditure becomes a central issue in order to reach out to the voters, the more the budget the better the reach. It has been observed that, “In a world where obtaining and transferring information is a costly activity the role of money is very important in shortening the distances between the candidate and his potential voters”.\textsuperscript{148} It is arguable that the factor of rising election expenditures can be exploited by established organized criminals through their financial

\textsuperscript{146} Kristain S. Padla, \textit{Does Canada’s Election Act Impede Voter’s Access to Information?} (Canadian Public Policy, 1985) vol.11 issue 3 at 534.
\textsuperscript{147} \textit{Ibid.}
\textsuperscript{148} \textit{Ibid.}
power to gain inroads into the political system as has been seen in Indian context and discussed later in the concluding chapter of the thesis.

**Differences in organized crime scenarios**

The major differences in the organized crime scenario in Canada and India can be attributed largely to factors such as population, politico-social conditions, economy, geographical situation and the issues occupying the national agenda of a developed and developing country. The major points of differences between the organized crime scenarios in the two countries can be enumerated as below:

**a. Cognizance of the phenomenon**

In Canada, cognizance of the phenomenon arose as early as the 1970s and from thereon a definitive policy has been formulated to combat this trend through various research initiatives. In terms of legislative responses, amendment of the *Criminal Code* at the national/federal level has been undertaken to address the criminal organization aspect of organized crime. However, in the Indian context no cognizance of the phenomenon has been taken at national/federal level and out of 28 states/provinces only 4 states/provinces have taken account of the situation and acted through the way of legislative measures. The menace has started spreading its tentacles from the once concentrated strongholds but the fact has failed to attract the attention of the authorities to take the cognizance of the same.

**b. Economic considerations**

Canada has a developed economy and has relatively vast resources as compared to the population that has to be sustained. The consideration for allocation of resources is centered towards providing a better quality of life for citizens. The economy can afford to support research initiatives towards better understanding of the phenomenon of organized crime. In the Indian
context the picture is altogether different; the population outweighs the resources and the economy has to concentrate on supporting the very existence of the masses that are struggling below the poverty line and on providing them with extensive educational and medical facilities. The lack of resources hinders the research in the area of organized crime and the problem is left to be tackled by the affected states/provinces with no central policy in place to take cognizance of the phenomenon at national level.

c. **Law enforcement agencies and constitutional provisions**

In the Canadian context, the law enforcement agencies adhere to the explicit *Charter* provisions that safeguard the interests of an individual against state excesses or wrongful prosecution. Any violation of the *Charter* provisions invites immediate and stern judicial action. As a result, the legislature can enact stringent legislation to counter any phenomenon, in the present case the phenomenon of organized crime, without having to worry about the abuse of provisions by enforcement agencies. However, the situation in the Indian context is altogether different. Although the Indian constitution provides for fundamental rights (the equivalent of the Canadian Charter Rights), in reality they are violated with impunity by enforcement agencies. Every now and then allegations are proven against the police authorities for extra judicial killings (fake encounters), custodial deaths and illegal custodies. In 1999-2000, the National human Rights Commission (NHRC) received reports of 177 custodial deaths, 1,157 illegal detentions and arrests, 1,647 false implications and 5,783 other police excesses.\(^{149}\) The reasons responsible for this behavior of police authorities include overworked schedule, increased organized crime activities, political patronage of criminals, lack of training, improper investigation and the daunting task of producing results in such an environment.

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In such a scenario, the legislature is caught in a “catch-22” situation: if the legislature enacts stringent legislative measures then it faces the possibility of the provisions being abused, but if the legislature foregoes incorporation of stringent measures then the legislation remains ineffective. Accordingly, the legislature has to compromise on the incorporation of potent and vital provisions in any law. This factor can be said to be a major point of difference in organized crime scenarios in the two countries.

d. Infrastructure

In Canada, there is a very extensive infrastructure that has been made available at the disposal of law enforcement agencies to combat the phenomenon of organized crime. The authorities are able to keep pace with technological innovations that are being employed by the organized criminals. However, the situation is not the same in the Indian context, the enforcement agencies lack the requisite equipment and expertise to deal with the complex nature of crime. The organized criminals can evade the prosecution by employing new techniques and innovations that are alien to enforcement agencies.

e. Information sharing

The intelligence information sharing between the United States and Canada has benefited both the countries towards containment of cross border organized crime and has resulted in unearthing various organized criminal gangs. The measures in the said direction have included the “redeployment of NORAD towards interdiction efforts; the drafting of numerous memoranda of understanding on key border issues; the development of the Customs Mutual Assistance Agreement (CMAA); the establishment of reciprocal access to databases and police technology, including criminal record databases and intelligence; information sharing via automated border-monitoring technologies; joint enforcement operations involving the Royal Canadian Mounted Police (RCMP) and the Drug Enforcement Administration (DEA) such as Operations Pipeline,
Convoy and Jetaway; the establishment of the Canada-U. S. Cross Border Crime Forum (1997) to improve cooperation and information sharing; the deployment of the Integrated Border Enforcement Team to track and impede criminal activities across the British Columbia-Washington state border; and the Project North Star initiative to further enhance existing partnerships and operations between Canadian and American law enforcement in addition to promoting cross-border training and the effective use of resources and intelligence.”

Moreover owing to its geographical location, Canada has to share its national borders with one country only i.e. United States with whom it has very cordial relations. This aspect eases the requirement to have information sharing agreements with a number of neighboring countries.

In the Indian context, the country has a very vast border line and shares its borders with hostile neighbors on almost all fronts except for one i.e. Nepal. The neighboring countries are more inclined to disrupt the affairs of the nation, leave alone sharing information or pooling resources to fight the phenomenon of organized crime collectively. This fact makes the task of enforcement agencies even more daunting as in a majority of cases the neighboring countries sponsor the criminals and cross border smuggling of contrabands rather than containing the criminal elements through mutual cooperation.

These similarities and differences between the organized crime scenarios in the two countries provide an insight towards seeking an effective solution to the phenomenon. After having determined the problem, its magnitude, threat perception and consequences it would be now appropriate to analyze the legal treatment of the problem in both the countries.

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150 Kyle Grayson, Chasing Dragons: Security, Identity and Illicit Drugs in Canada (University of Toronto Press, 2008) at 82 and 83.
CHAPTER 2

THE LEGAL TREATMENT OF THE PHENOMENON OF

ORGANIZED CRIME

Canada

It would be appropriate to first look at the model of law and background of the legislative measures in order to effectively analyze the measures adopted in the direction of containing organized crime.

- Model of law

In relation to actual and potential law making, the Constitution of Canada has distributed powers and responsibilities between the federal parliament and provincial legislatures by two lists of categories or classes. The Constitution lists federal powers in section 91 of the Constitution Act, 1867 and provincial powers in section 92 of the Act.\(^{151}\)

The federal parliament is responsible for the regulation of criminal law (Criminal Code), trade and commerce and a general power to enact laws in all matters not assigned to the provinces. The provincial legislatures are responsible for property and civil rights (civil forfeiture legislation), local works and undertakings and all matters of local or private nature.

Apart from constitutional considerations, the general development of public policy is required for the enactment of legislation at federal or provincial level. In relation to organized crime, the Canadian response can be understood from the study of the policy and legislative background to the issue.

Policy background

The study of early Canadian discussions on organized crime, in the form of inquiries and police reports, was largely influenced by the American experiences, especially the example of the U.S. McClellan Commission (1963) and the 1967 report to U.S. Congress. These reports directly influenced the statements made by law enforcement officials in Canada as well as the recommendations of various Canadian inquiries.\(^\text{152}\)

The Canadian reports on this issue also pointed to the threat perception of American organized crime extending its tentacles into the Canadian organized crime scene. The threat was substantiated by the subsequent discovery of police corruption in the anti-gambling squad of the OPP. The discovery led to the creation of the Ontario Police Commission (OPC) for overseeing enforcement and the appointment of Justice Roach, in December 1961, as Royal Commissioner to examine the extent of organized crime in Ontario.\(^\text{153}\)

A series of federal-provincial conferences with a focus on organized crime were held in 1965 and 1966. The 1966 report of the Federal-Provincial Conference concluded that organized crime was involved in nearly all fields of business and commerce and that there was a close working relationship and personal ties among the organized crime groups of the U.S. and Canada.\(^\text{154}\) These conclusions led to the creation of the Criminal Intelligence Service Canada (CISC), recognition of the need for a centralized police information network (CPIC) and upgraded police training facilities that eventually became the Canadian Police Academy.\(^\text{155}\) The threat of organized crime was confirmed and it paved the way for legislative measures at provincial and federal levels.


\(^{153}\) Ibid at 141.

\(^{154}\) Ibid at 143.

\(^{155}\) Ibid.
- Legislation background

Legislation pertaining to organized crime in Canada can be traced back to 1973 when Ontario established the Royal Commission on Certain Sectors of the Building Industry. The report of this commission established a clear picture of bombings, violence and organized corruption. The same was accomplished in Quebec by the 1976 report of the Commission of Inquiry on Organized Crime. The findings of these commissions were broadcasted and the concern was raised at both provincial and federal levels.

In the backdrop of introduction of a private member’s bill in the Ontario legislature, the matter was referred to the Federal Minister of Justice by the Attorney General of Ontario. As a result, section 312 of the Criminal Code was amended in 1975 which primarily focused on possession of stolen property.\(^{156}\) Furthermore, a 1980 report by the Province of British Columbia entitled ‘The Business of Crime: An Evaluation of the American RICO Statute from a Canadian Perspective’ portrayed Canada as a “branch plant to the U.S. mafia” and advocated the introduction of RICO provisions adapted to Canadian scene.

Owing to the pressure from Ontario and British Columbia reports, the federal government established ‘Federal-Provincial Enterprise Crime Working Group’. The working group recommended the Proceeds of Crime legislation (which came into force in January 1989) and an intensive study on money laundering in Canada but rejected the RICO styled provisions as being potentially abusive and inappropriate.\(^{157}\)

From 1989 until 1997, the Canadian response to the phenomenon of organized crime was basically limited to the proceeds of crime legislation. In 1997, through Bill C-95, amendments were carried out to the Criminal Code of Canada to encompass the definition of ‘criminal

\(^{156}\) Ibid at 155.
\(^{157}\) Ibid at 157.
organization’ in section 467.1 (1). The bill C-95 was enacted in direct response to a vicious and highly public war that was being carried on in the streets of Montreal for the control of Quebec’s multimillion dollar drug trade. The tussle between Hell’s Angels and Rock Machine motorcycle clubs had claimed the life of an innocent eleven year old boy in August 1995. This incident along with continued unabated violence triggered a public outcry for immediate measures.

Subsequently, United Nations Convention Against Transnational Organized Crime (UNTOC) was adopted in 2000 by the General Assembly of UN. The convention required from its signatories (Canada being one them) to encompass four substantive criminal offences and provided definitions for the same, the offences included participation in a criminal group and money laundering among others. The federal and provincial legislative measures adopted in Canada in the backdrop of model of law and public policy can be further analyzed in detail as below:

**Federal legislative measures**

- Sections 467.1 (1), 467.11, 467.12, 467.13 of Criminal Code
- Section 462.37 of Criminal Code: forfeiture of proceeds of crime
- Proceeds of Crime (Money Laundering) and Terrorist Financing Act, 2000

**Provincial legislative measures**

- Civil Remedies Act, 2001

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159 Ibid.
Federal legislative measures

I. Sections 467.1 (1), 467.11, 467.12, 467.13 of Criminal Code

Section 467.1 (1) - Definition of ‘criminal organization’ and associated offences in the Criminal Code

The legal definition of organized crime, as relied upon by law enforcement agencies in Canada, came into being in the late 1990’s following the enactment of Bill C-95. Through this bill, amendments were carried out to the Criminal Code of Canada in April, 1997 to encompass the legal definition of criminal organization. Subsequently, Bill C-24 repealed the definition created by Bill C-95 and led to the present day definition of criminal organization as contained in the section 467.1 (1), which came into force on January 7, 2002.\(^{160}\)

According to section 467.1 (1), “Criminal organization” means a group, however organized, that:

(a) is composed of three or more persons in or outside Canada; and,
(b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences, that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any one of the persons who constitute the group.

It does not include a group of persons that forms randomly for the immediate commission of a single offence”.\(^{161}\) The essential elements of the definition that need to be proved for the purpose of prosecution can be enumerated as below:

\(^{160}\)“Canadian Definition”, online: Royal Canadian Mounted Police <http://www.rcmp-grc.gc.ca/organizedcrime/what_e.htm>.

\(^{161}\)Ibid.
a. Group of three or more persons

The definition makes it clear that a formal organization or formal membership in the organization is not required for ascertaining the association of persons with the group.\textsuperscript{162} Even a loosely structured group of three or more persons can come under the purview of this section. The association of persons with the group, as part of the group, or merely as associates, as well as the question of whether they would be considered part of three or more people constituting the group, depends upon the evidence of their involvement with the group.\textsuperscript{163} The definition takes into account the fact that usually such organizations have a loose structure wherein there is no formal attribution of specific roles and the only criteria for ascertaining the constitution of the group is circumstantial and other evidence.

b. Nature of the organization

One of the necessary characteristic features of a group to be considered a criminal organization is that one of its main purposes or main activities includes the facilitation or commission of offences that are punishable with imprisonment for more than five years.\textsuperscript{164} The commission of offences should not be incidental to the activities of a group but should be a significant part of its activities.

Moreover there should be an element of material benefits to either the group or to any of the persons that constitute the group, if:

- “the offence that is being facilitated by the group is eventually committed, or

\textsuperscript{162} Mark K. Levitz and Robert Prior, “Criminal organization legislation: Canada’s response” (May 2003) The Advocate 61.3 at 375(15).
\textsuperscript{163} Ibid.
\textsuperscript{164} Ibid.
- the group, any of the persons who constitute the group or someone acting under the
direction of the group commits the offence").

The element of financial or material benefit should be the ultimate objective behind undertaking
the commission or facilitation of offences. The definition includes two distinct types of role that a
group could undertake in order to benefit from its operations i.e. either through the commission of
offences through its own members or facilitating the commission of crime through their actions.
In either case the group will be considered to be a criminal organization for the purposes of this
section.

“For the purposes of this section and section 467.11, facilitation of an offence
does not require knowledge of a particular offence the commission of which is
facilitated, or that an offence actually be committed.

Furthermore in this section and in all criminal organization offences (ss. 467.11
to 467.13), committing an offence means being a party to it or counselling any
person to be a party to it.”

The investigation and sentencing rules pertaining to criminal organization offences are also
unique. The wiretap authorizations for criminal organization offences may be valid for up to one
year (s. 186.1); the applicant is not required to establish investigative necessity to obtain an
authorization (s. 186(1.1)) and an accused charged with a criminal organization offence faces a
reverse onus on any bail application (s. 515 (6) (a)).

165 Ibid.
166 “Section 467.1 (2) and (3), Criminal Code”, online: Department of Justice, Canada
<http://laws.justice.gc.ca/en/ShowDoc/cs/C-46/bo-ga1_XII_2::bo-
 ga1_XIII/en?page=9&isPrinting=false#codese:467_1-ss:_2_/>.
Participation offences

Section 467.11 - Enhancers

Apart from defining the criminal organization, Bill C-24 replaced the offence of participating in a criminal organization with three new offences that focused on the enhancers, soldiers and leaders of criminal organizations.\(^{168}\) Section 467.11 (1) deals with the offence of enhancing the ability of a criminal organization which is reproduced as below:

“Every person who, for the purpose of enhancing the ability of a criminal organization to facilitate or commit an indictable offence under this or any other Act of Parliament, knowingly, by act or omission, participates in or contributes to any activity of the criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.”\(^{169}\)

The section makes it an offence for participating or contributing to any activity of the criminal organization for enhancing or facilitating the ability of the criminal organization. For the purpose of establishment of guilt of an enhancer, punishable with imprisonment up to five years, it is not necessary for the prosecution to prove that i) the criminal organization actually facilitated or committed an indictable offence; ii) the participation or contribution of the accused actually enhanced the ability of the criminal organization to facilitate or commit an indictable offence; iii) the accused knew the specific nature of any indictable offence that may have been facilitated or committed by the criminal organization; iv) the accused knew the identity of any of the persons who constitute the criminal organization.\(^{170}\)

Moreover for establishing the role of an enhancer the Court can take into consideration the factors such as whether the accused uses a name, word, symbol that is representative or is associated with the criminal organization, the degree of association with any of the persons who constitute

\(^{168}\) Supra note 162.


\(^{170}\) Ibid. See section 467.11 (2).
criminal organization, receipt of any benefit from the criminal organization and repeated engagement in activities at the instruction of any of the persons who constitute the criminal organization.\textsuperscript{171}

\textbf{Section 467.12 – Soldiers}

The organized crime groups depend upon their foot soldiers or operatives for carrying out necessary operations; they are the backbone of every criminal organization. In order to paralyze the functioning of organized crime groups, section 467.12 (1) provides for the offence of commission of an indictable offence on behest of a criminal organization. The section is reproduced as below:

\begin{quote}
“Every person who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, a criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.”\textsuperscript{172}
\end{quote}

In order to prosecute under this section it is not necessary that accused should be a member of the criminal organization (upon directions, benefit or with association of whom he had committed an indictable offence). Similarly, the accused need not know the members of the criminal organization or, in other words, it is not necessary for the prosecution to prove that the accused knew the identity of any of the persons who constitute the criminal organization.\textsuperscript{173}

The sentence awarded under section 467.12 (as well as under ss. 467.11 and 467.13) runs consecutive to the sentence for the predicate offence, thus by elevating liability for the predicate

\begin{footnotesize}
\textsuperscript{171} \textit{Ibid.} See section 467.11 (3).
\textsuperscript{172} \textit{Ibid.} See section 467.12 (1).
\textsuperscript{173} \textit{Ibid.} See section 467.12 (2).
\end{footnotesize}
offence quite substantially.\textsuperscript{174} The complex nature of the model as whole, the scope and application of ss. 467.12 and 467.11 was discussed in \textit{R. V. Lindsay}, wherein

“Fuerst J. considered the legislative history of the provisions and held that the legislation relied on terms that are all either defined in the statute itself or could be reasonably assumed to bear their dictionary definitions, and as such the legislation is not vague. It is not overly broad in her view because it is directly connected to the policy Parliament clearly accepted.”\textsuperscript{175}

The objection of vagueness and over breadth pertaining to the application of criminal organization offences, when read with the definition of “criminal organization”, does not hold good as the intention behind the legislation has been to curtail a phenomenon that encompass a complex and diverse network and structure. The crime in question is not a traditional crime that can be contained with a straight forward approach and legislative measures; rather it is a conglomerate or hybrid form of crime. Although the nature of legislation is complex, it is the need of the hour, and that is not by choice.

\textbf{Section 467.13 – Leaders}

The section deals with the top hierarchy of the criminal organization that is responsible for constituting a criminal organization and instructing the persons to commit offences for the organization. The section provides maximum punishment of imprisonment for life. The section 467.13 (1) is reproduced as below:

“Every person who is one of the persons who constitute a criminal organization and who knowingly instructs, directly or indirectly, any person to commit an offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, the criminal organization is guilty of an indictable offence and liable to imprisonment for life.”\textsuperscript{176}

\textsuperscript{175} \textit{Ibid}.
\textsuperscript{176} \textit{Supra} note 166. See section 467.13 (1).
In order to facilitate the prosecution of leaders, it has been provided that it is not necessary for the prosecution to prove that i) an offence other than the offence under the subsection (1) was actually committed; ii) the accused instructed a particular person to commit an offence; or iii) the accused knew the identity of all persons who constitute the criminal organization.177

The essential elements for prosecution under this section include that the person should be a member of a criminal organization and should have provided instructions to commit an indictable offence for the benefit of the criminal organization, at the direction of the criminal organization and in association with the criminal organization.

The indictable offence being for the benefit of the organization implies that the criminal organization should have gained an advantage in some way from the criminal act. However, the benefit need not necessarily be economic in nature.178 In R. v. Leclerc179, it was observed that a “benefit” could include making it possible to provide the gang with an increased presence on a particular territory to deal with narcotics.

Unlike the other two criminal organization offences, in the case of the instructing offence the prosecution has to prove that the accused is one of the persons who constitute a criminal organization. The accused must have knowingly instructed directly or indirectly another person to commit an offence and the instructed offence could be an offence under any federal statute in contrast to the other two criminal organizations offence sections where predicate offences are limited to indictable offences only. “It is the instruction that is the offence rather than the predicate offence instructed which may be any federal offence and need not be actually committed.”180

177 Supra note 166. See section 467.13 (2).
178 Supra note 162.
180 Supra note 162.
The leaders are targeted for their role of imparting instructions and considering the fact that they are epicenter or nerve centre behind the constitution and functioning of a criminal organization.

The well-established principle of fundamental justice, “under Section 7 of the Charter stating that criminal legislation must not be overbroad and certainly cannot be arbitrary in the sense that it is inconsistent with or unrelated to its objective”\(^\text{181}\), came into question in context of this section. Owing to the complex nature of the criminal organization model, the question regarding the vagueness and over broadness of s. 467.13 was held in \(R.\ v.\ Terezakis\) to be justified (reversing the trial decision), and so the validity of s. 467.13 was affirmed.\(^\text{182}\) Subsequently, leave to appeal was filed in the Supreme Court of Canada which was dismissed in \(R.\ v.\ Terezakis\ [2007]\) S.C.C.A. No. 487.

The case of \(R.\ v.\ Terezakis\) was an appeal from the judgment wherein the trial judge had concluded that “s. 467.13 was constitutionally vague and overbroad because of difficulties with the meaning of criminal organization, a term defined by s. 467.1 (1) and linked to essential elements of the offence”\(^\text{183}\). In relation to the meaning of “group” in the definition of criminal organization, the trial judge concluded that “the area of risk inherent in group, however organized was essentially unconstrained and consequently so vague as to constitute no meaningful guidance at all”. Alternatively, the judge concluded that “if it was not vague, it was almost boundless and overbroad”.\(^\text{184}\)

“The trial judge addressed the limiting elements of the instruction offence in s. 467.13, having found an ambit of "persons who constitute a criminal organization" that is very broad and extends to persons who may be unaware that the organization has a main serious purpose or activity. She accepted that a person who "knowingly instructs" the commission of an offence must be in a position of authority but she rejected the submission of counsel for the Attorney General that the person giving the instruction necessarily must be a member of

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\(^{181}\) Supra note 174.
\(^{183}\) Ibid.
\(^{184}\) Ibid.
the criminal organization and aware of that fact. In her view, the instructing person's position of authority may be unrelated to the group and the person may commit an offence in close connection with the criminal organization without being a member of the group. She noted that the instructed offence does not have to be a serious offence and extends to any offence under a federal statute.\textsuperscript{185}

The conclusion regarding vagueness and over broadness of s. 467.13 was reversed by the Court of Appeal and it was held that s. 467.13 is not constitutionally flawed with respect to the vagueness and over broadness. It was argued that:

\begin{quote}
“the breadth of ss. 467.1 and 467.13 is limited because the person instructing must be a member of the criminal organization, must give the instruction on behalf of the organization and, inferentially, must have authority that derives from the person's position in the criminal organization. The position was stated succinctly in British Columbia's factum:

Being at the 'direction of' the criminal organization requires proof that in some way the organization itself (including a person who had authority to act on behalf of the criminal organization), not just an individual member looking after his own interests, was directing the commission of the offence.”\textsuperscript{186}
\end{quote}

The notion of the trial judge that the ambit of persons who constitute a criminal organization is very broad and could apply to a person who may have been unaware of the main serious purpose or activity of the organization is unfounded. The reason being that the guilt under the criminal organization offences is subject to a consideration of facts and circumstances of each case rather than a matter of rule. Thus, if in any given case such situation arises in which it is established beyond reasonable doubt that the member was unaware of the serious purpose or activity of the organization, then he could not be prosecuted under the provisions of criminal organization offences. For the purposes of s. 467.13, a member should be one of the three or more persons, as the case may be, who constitute the criminal organization, aware of the serious purpose or activity and in a position of authority wherein he can direct others. If the person is a member and not aware of the serious purpose then he is not one of the members who constitute criminal organization and hence he could not be prosecuted under s. 467.13. It has been held in R. v.

\begin{flushright}
\textsuperscript{185} \textit{Ibid.}  \\
\textsuperscript{186} \textit{Ibid.}
\end{flushright}
Terezakis that the persons who constitute "the group, however organized" cannot be interpreted so broadly as to ensnare those who do not share its criminal objectives.” 187

The requirement that a member should be aware of the serious purpose or activity of the criminal organization for the purposes of prosecution has been inserted as a safeguard in the light of the fact that several criminal organizations employ the means of engaging in legitimate business enterprises as cover up operations for their illegal activities.

II. Section-462.37: Forfeiture of proceeds of crime

By the virtue of Bill C-24 the general provisions of Part XII.2 of the Criminal Code, pertaining to proceeds of crime and forfeiture, have been made applicable to the proceeds of all indictable offences including all three criminal organization offences.188 Thus provisions such as the pre-trial seizing or freezing of the proceeds of crime through a special search warrant or a restraint order and forfeiture of the proceeds of crime have also become applicable in case of proceeds from the criminal organization offences.

For the purposes of this section the definition of proceeds of crime has been reproduced as below:

"Proceeds of crime means any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of

(a) the commission in Canada of a designated offence, or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence."189

187 Supra note 167.
188 Supra note 162.
The definition includes the original property (derived directly) derived from the commission of an offence as well as the property into which the original property can be traced (derived indirectly). The main conditions for forfeiture under this section can be enumerated as below:

**Conditions for forfeiture**

The conviction is the main prerequisite for the forfeiture of property under this section. Upon conviction for the commission of a designated offence (including criminal organization offences), an order for forfeiture can be issued by the Court on the satisfaction of a balance of probabilities that:

- within ten years before the proceedings commenced, the offender engaged in a pattern of criminal activity for the purpose of directly or indirectly receiving a material benefit, including a financial benefit; or

- the income of the offender from sources unrelated to designated offences cannot reasonably account for the value of all the property of the offender.\(^{191}\)

The code permits a forfeiture order in respect of the property that is derived from the offence for which the offender is sentenced as well as in respect of the property that is not necessarily derived from the offence for which the offender is being sentenced.\(^{192}\) The main criterion for forfeiture is the satisfaction beyond a reasonable doubt that property is the proceeds of crime even if the evidence is not sufficient to establish that property relates to the offence for which the offender is being sentenced.

The forfeiture of proceeds of crime, pertaining to indictable offences and criminal organization offences, provided in *Criminal Code* has been somewhat ambiguous with respect to safeguarding


\(^{191}\) Supra note 189. See section 462.37 (2.01).

\(^{192}\) Supra note 190.
the interest of third parties. Sub section (3) of s. 462.37 provides for imposition of a fine in lieu of forfeiture of property under specific circumstances.

Section 462.37 (3) provides for the imposition of fines where proceeds of crime in the form of property or any part of or interest in the property has been transferred to a third party and thus cannot be made subject to a forfeiture order. According to the interpretation of the section it could be construed that the proceeds of crime that have been transferred to a third party are not available for forfeiture unless the transfer is set aside. However this argument was rejected by the British Columbia Court of Appeal in R. v. Rosenblum. The court held that “merely transferring property to a third party does not preclude the making of a forfeiture order” and suggested that “a transfer to a third party would only preclude the making of a forfeiture order in a limited set of cases, such as where property has been transferred to a third party who cannot be located and who cannot, therefore, be served with the notice that is a prerequisite to certain types of forfeiture orders”.

The section explicitly provides that the property that has been transferred to a third party cannot be subject to the forfeiture order and a fine could be imposed in lieu of that property so that the interest of the third party could be safeguarded. However, the interpretation of this provision by the court affects a third party’s interest in proceeds of crime in exactly the same way as the interests of an offender. This position has led to an ambiguous state and a position wherein the legislative attempt to safeguard third party interests has been negated by judicial interpretation.

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193 Supra note 189. See section 462.37 (3).
194 Supra note 190.
196 Supra note 190.
III. Proceeds of Crime (Money Laundering) and Terrorist Financing Act, 2000

This piece of legislation, enacted by the Federal Parliament, deals with the issue of the laundering of ill-gotten money derived through organized criminal activities. The legislation also covers the interrelated issue of finances provided for terrorist activities via illegal means.

For the purposes of this act, “money laundering offence” means an offence as defined in subsection 462.3 (1) of the Criminal Code.

"Proceeds of crime means any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of

(a) the commission in Canada of a designated offence, or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence."\(^{197}\)

Legislative history

The bill pertaining to the enactment of this legislation (Bill C-22) was aimed to overcome the shortcomings in the existing anti-money laundering legislation. The shortcomings were identified by the G-7’s Financial Action Task Force (FATF), 1997-98 report on Money Laundering.\(^{198}\)

The report highlighted the inability of the existing legislation to “effectively and efficiently respond to requests for assistance in relation to restraint and forfeiture” as the major shortcoming.\(^{199}\) The other recommendations were the mandatory reporting requirements and establishment of a “financial intelligence unit to deal with the collection, management, analysis


\(^{198}\)Supra note 29.

\(^{199}\)Ibid.
and dissemination of suspicious transaction reports and other intelligence data”. Furthermore, salient features of this legislation can be enumerated as below:

**Salient features of the act**

**a. Mandatory reporting of suspicious transactions**

The Act makes it mandatory for every person or entity (including foreign banks, cooperative credit societies, businesses dealing with securities and foreign exchange, to name a few, as defined in section 5 of the act) to report to the Financial Transactions and Reports Analysis Centre, every financial transaction carried out in their ordinary course of business that seems to be related to the commission of a offence of money laundering or of a terrorist activity financing.

**b. Reporting of displacement of currency and monetary instruments**

Under the provisions of the act, every person or entity is bound to report the importation or exportation of currency or monetary instruments, the value of which is equal to or greater than the prescribed amount in the act. For enforcement purposes, search provisions are provided for in relation to the body of a person, conveyance or baggage upon reasonable grounds of suspicion of non disclosure of currency or monetary instruments of value as mentioned before. Furthermore, the power to seize the currency or monetary instruments has been conferred upon the officers

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202 *Ibid* at section 12.
203 *Ibid* at section 15.
subject to belief on reasonable grounds that the provisions of disclosure have been contravened.\textsuperscript{204}

c. Forfeiture provisions

The act provides for temporary retention of currency or monetary instruments for a prescribed period in order to enable a person or an entity to complete the reporting requirements.\textsuperscript{205} Upon the expiry of the prescribed period, power to forfeit the currency or monetary instruments has been provided in the act.\textsuperscript{206}

d. No review or setting aside provisions

The forfeiture of seized currency or monetary instruments is considered final and is not subject to review or setting aside provisions under the act.\textsuperscript{207} However, there are certain exceptions to that rule in the form of section 24.1 and section 25\textsuperscript{208} that are reproduced as below:

Section 24.1

\begin{quote}
“24.1 (1) The Minister, or any officer delegated by the President for the purposes of this section, may, within 30 days after a seizure made under subsection 18(1) or an assessment of a penalty referred to in subsection 18(2),

(a) cancel the seizure, or cancel or refund the penalty, if the Minister is satisfied that there was no contravention; or

(b) reduce the penalty or refund the excess amount of the penalty collected if there was a contravention but the Minister considers that there was an error with respect to the penalty assessed or collected, and that the penalty should be reduced.”\textsuperscript{209}
\end{quote}

\textsuperscript{204} Ibid at section 18.
\textsuperscript{205} Ibid at section 14(1).
\textsuperscript{206} Ibid at section 14(5).
\textsuperscript{207} Ibid at section 14(5).
\textsuperscript{208} Ibid at section 24.
\textsuperscript{209} Ibid.
\textsuperscript{209} Ibid at section 24.1 (1).
Section 25

“25. A person from whom currency or monetary instruments were seized under section 18, or the lawful owner of the currency or monetary instruments, may within 90 days after the date of the seizure request a decision of the Minister as to whether subsection 12(1) was contravened, by giving notice in writing to the officer who seized the currency or monetary instruments or to an officer at the customs office closest to the place where the seizure took place.”

In all the cases, apart from the ones falling under the exceptions reproduced above in ss. 24.1 and 25, forfeiture of seized currency or monetary instruments is considered final and is not subject to review or setting aside provisions under the act.

e. Establishment of Financial Transactions and Reports Analysis Centre

The Act provides for establishment of a centre that is responsible for the collection, analyzing, assessing and disclosing information “in order to assist in the detection, prevention and deterrence of money laundering and of the financing of terrorist activities”.

f. Severe punitive measures

Depending upon the gravity of offences, the Act provides for punishments ranging from fines of $50,000 up to $2,000,000 or imprisonment ranging from six months to five years or both.

Furthermore, the provisions of the Act in total and its effectiveness can be analyzed as below:

Analysis

The Proceeds of Crime (Money Laundering) and Terrorist Financing Act, 2000, hereinafter referred to as PCMLTFA, led to the creation of The Financial Transactions and Reports Analysis

210 Ibid at section 25.
211 Ibid at section 40.
212 Ibid at section 74-77.
The FINTRAC acts as a financial intelligence unit, a specialized agency that is responsible for the collection, analysis and disclosing of financial information and intelligence on suspected money laundering and terrorist activities financing. From its inception in 2000 until 2003, FINTRAC has referred just over 100 cases to the RCMP. For the year 2005, there were 142 reported case disclosures of financial intelligence involving approximately $2 billion in financial transactions. In the same year, a total of 20 memoranda of understanding (MOU) were signed with foreign financial intelligence units (FIUs).

For the year 2006, FINTRAC reported 168 case disclosures of financial intelligence involving just over $5 billion in financial transactions and reached a total of 30 memoranda of understanding with foreign financial intelligence units.

The case disclosure figures for 2007 were 193 reported cases involving a value of 9.8 billion in financial transactions. Furthermore, for the first time in the history of FINTRAC, three disclosures, each valued at more than $1 billion, were made and 15 new memoranda of understanding were signed with foreign financial intelligence units, thus by bringing the total number of MOUs to 45.

The effectiveness and base of operations of FINTRAC has received a shot in the arm through the amendments carried by Bill C-25 in PCMLTFA. The amendments “expand the coverage of the

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215 Supra note 213.  
217 Ibid.  
218 Ibid.  
220 Supra note 216.
law, strengthen its deterrence provisions, and broaden the range of information that FINTRAC may disclose to law enforcement and national security agencies”. Furthermore, the amendments have brought four additional business and professional sectors within the purview of the Act, created a system of graduated administrative monetary penalties for non-compliance of the provisions and have expanded the extent of designated information that FINTRAC can provide in a case disclosure to include even telephone number and electronic mail address of any party involved or its agent and telephone number of the place of business of the alleged transaction.

**Property seizures**

Since the enactment of Proceeds of Crime legislation in Canada, one of the largest amongst high-profile seizures has resulted from a drug investigation involving the RCMP, Vancouver Police Department and the US Drug Enforcement Administration. In the outcome, more than $15 million worth of property was seized in British Columbia, primarily comprising of vessels and real estate. For the period 1989-1993, Canadian police seized assets totaling $72 million from drug related crimes. In 1991, the Canada Drug Strategy funded the establishment of three pilot Integrated Anti-Drug Profiteering Units (IADP) within the RCMP. For the period 1992-1996, these units seized $87.2 million in cash and assets and realized $25.04 million in forfeiture.

In 1996, Integrated Proceeds of Crime (IPOC) Initiative was implemented, which established ten more integrated units supplementing the existing IADP units. Between fiscal years 1996-97 and 1999-2000, IPOC investigations resulted in $53 million in seizures and almost $60 million in

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222 Ibid.
224 Ibid.
225 Supra note 133 at 24.
226 Supra note 133 at 175.
227 Supra note 133 at 25.
According to the 2000-2001 Performance report of the RCMP, all IPOC and satellite units realized $23.6 million in seizures, collected $10.7 million in revenue, and resulted in $55 million as referrals to other law enforcement agencies. As per 2001-2002 performance report, $46 million was seized in assets, $13.7 million was collected in revenue, and $59.4 million was referred for investigation to other law enforcement agencies. These initiatives undertaken to enforce the provisions of proceeds of crime legislation have been quite successful considering the amount of seizures and the very purpose of their creation.

On 24 February, 2003, the Solicitor General announced that the IPOC program “has contributed to seizures of criminal assets of more than $215 million and forfeitures of more than $86 million. It has referred cases worth $89 million to other jurisdictions in Canada and abroad.” The legislative intent to take out the profit motive from criminal activities seems to be realizing through these initiatives.

**Critique of money laundering provisions and measures**

The forfeiture of property provisions as provided under s. 8 (1) and forfeiture of vehicle provisions as provided under s. 11.2 (1) of the Act have been criticized on the grounds that they have failed to protect the interests of innocent parties. Innocent parties can include joint tenants, business partners, lien holders and purchasers who are unaware of the fact that the property was used or derived from the instruments of unlawful activity. Although such category of innocent parties has been identified and recognized as legitimate owners and their interests are protected under the Act, however, the reality may be otherwise.

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228 *Supra* note 133 at 175.
It has also been observed that the application of forfeiture provisions has often been confined to low-level criminals or “small fishes”. Moreover, owing to the very nature of crime wherein the launderers keep on devising new strategies to legitimize proceeds of crime, the work of prosecution to identify and relate the property to a criminal activity becomes very time consuming. Available sources point to the instance of two cases in 1994 that took four years to develop.

A report of Department of Justice, Canada published in 2000 points out that, “adequate information on resource utilization and costs, as well as long-term impacts on organized crime was not available”. The report basically criticized the lack of vision and approach that is necessary to evaluate the forfeiture strategy of the Act. The evaluation of forfeiture strategy is necessary to make the strategy more affective.

After having analyzed the federal legislative measures this chapter will now look into the provincial legislative measures that have been adopted to contain the phenomenon of organized crime.

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234 Ibid.
235 Ibid.
236 Ibid.
Provincial legislative measures

I. Civil Remedies Act, 2001

In 2001, the Legislative Assembly of Ontario enacted the *Remedies for Organized Crime and Other Unlawful Activities Act, 2001*.\(^{237}\) This piece of legislation was aimed at providing civil remedies to the victims and preventing the proceeds of unlawful activities from being utilized for the purpose of keeping properties. The Act was later amended in 2007 and renamed the *Civil Remedies Act, 2001* and came into force on June 4, 2007.\(^{238}\)

The emphasis of this Act has been to provide respite to the sufferers of pecuniary and non-pecuniary losses incurred as a result of unlawful activities and preventing the property from being used in furtherance of commission of unlawful activities.

Since its enactment, this piece of legislation has been used to target illicit activities such as fraud, Internet and telemarketing scams, drug trafficking and marijuana grow operations. Since October 2003, $3.6 million in property has been forfeited and $11.3 million in property is currently frozen, pending completion of civil forfeiture proceedings.\(^{239}\)

Furthermore, the highlighting features of the Act can be enumerated as below:


\(^{238}\)“*Remedies for Organized Crime and other Unlawful activities Act, 2001*”, online: Ontario Citator Service <http://69.17.141.147/ocsweb?m=toc>.

a. Protection of legitimate owner’s interest

The proceedings under the Act can be initiated either through an application by an aggrieved party (legitimate owner) or through cognizance by the Attorney General.240 For the purposes of this Act,

“Legitimate owner means, with respect to property that is proceeds of unlawful activity, a person who did not, directly or indirectly, acquire the property as a result of unlawful activity committed by the person, and who,

(a) was the rightful owner of the property before the unlawful activity occurred and was deprived of possession or control of the property by means of the unlawful activity,

(b) acquired the property for fair value after the unlawful activity occurred and did not know and could not reasonably have known at the time of the acquisition that the property was proceeds of unlawful activity, or

(c) acquired the property from a person mentioned in clause (a) or (b).”241

The definition is quite exhaustive and takes into purview all the possible scenarios under which a bonafide owner can be affected through commission of an unlawful activity upon his title or ownership. The proceeds of unlawful activity have been defined as follows:

“proceeds of unlawful activity means property acquired, directly or indirectly, in whole or in part, as a result of unlawful activity, whether the property was acquired before or after this Act came into force, but does not include proceeds of a contract for recounting crime within the meaning of the Prohibiting Profiting from Recounting Crimes Act, 2002.”242

The court can pass appropriate orders for safekeeping of legitimate owner’s interest upon satisfaction that:

- the property in question is the one falling under the category of ‘proceeds of unlawful activity’ and,

242 Ibid.
the claim of the contesting party is genuine.

The s. 3 (4) (a) of the Act empowers the court to order severance or partition or sale or disposition of any interest in the property for the purpose of protection of the legitimate owner’s interest in the property. Furthermore, an order can also be passed under s. 3 (4) (b) that enables the Crown to take over the property, on behalf of the state, subject to the interest of legitimate owner.

b. Forfeiture of property

Section 8 (1) of the Act provides for the order of forfeiture of property by the Superior Court of Justice upon satisfaction that the property was used to engage in unlawful activity as an instrument. For the purposes of this section, an instrument of unlawful activity as defined in section 7 (1) has been defined as below:

“Instrument of unlawful activity means property that is likely to be used to engage in unlawful activity that, in turn, would be likely to or is intended to result in the acquisition of other property or in serious bodily harm to any person, and includes any property that is realized from the sale or other disposition of such property.”

Herein the property means real or personal property and also includes any interest in property. It is pertinent to mention here that even if the property in question is modified, sold or has been disposed of during the pendency of proceedings, the proceedings would continue unabated and would take in its purview the property that is realized from the disposition of original property for the purpose of suit. The Act provides that if the original property is found to have been an

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244 Ibid.
instrument of unlawful activity then the modified or realized property shall also be pronounced to be of same category by the court.\textsuperscript{246}

The Act also provides for the protection of the responsible owner’s interest in the same way as observed in the case of the legitimate owner. Responsible owner has been defined in the Act as follows:

“responsible owner means, with respect to property that is an instrument of unlawful activity, a person with an interest in the property who has done all that can reasonably be done to prevent the property from being used to engage in unlawful activity, including,

(a) promptly notifying appropriate law enforcement agencies whenever the person knows or ought to know that the property has been or is likely to be used to engage in unlawful activity, and

(b) refusing or withdrawing any permission that the person has authority to give and that the person knows or ought to know has facilitated or is likely to facilitate the property being used to engage in unlawful activity.”\textsuperscript{247}

Considering the provisions that have been incorporated in the Act, it would be right to conclude that adequate measures have been provided for safeguarding the interests of bonafide owners from persecution.

c. Forfeiture of vehicle

Under the provisions of s. 11.2 (1), the court is empowered to order forfeiture of a vehicle upon satisfaction that it “was or is likely to be used to engage in vehicular unlawful activity and is owned by or is in the care, control or possession of a person whose driver’s license has been


\textsuperscript{247} Supra note 245.
suspended under the *Highway Traffic Act* for vehicular unlawful activity for two or more times in the preceding 10 years”.\(^{248}\)

This section is specifically targeted at disrupting the transportation system used by organized criminals as a distribution channel for contrabands and as a medium for evading investigations and arrests. For the purposes of this section vehicular unlawful activity has been defined as follows:

“Vehicular unlawful activity means an act or omission that,

(a) is an offence under section 253, 254 or 255 of the *Criminal Code* (Canada) or another provision of the *Criminal Code* (Canada) that is prescribed by the regulations made under this Act, or

(b) is an offence under subsection 53 (1.1) of the *Highway Traffic Act* or another provision of the *Highway Traffic Act* that is prescribed by the regulations made under this Act, subject to the conditions or in the circumstances prescribed by the regulation, or

(c) is an offence under an Act of a jurisdiction outside Ontario, if a similar act or omission would be an offence described in clause (a) or (b) if it were committed in Ontario,

Whether the act or omission occurred before or after this Part came into force.”\(^{249}\)

Sections 253, 254 and 255 of the *Criminal Code* deal with impaired driving or operation of a motor vehicle, vessel, aircraft or railway equipment\(^ {250}\) and subsection 53 (1.1) of the *Highway Traffic Act* deals with the offence of driving a motor vehicle or street car on a highway with a suspended license.\(^ {251}\)

\(^{248}\) “See section 8 (3.1), *Civil Remedies Act, 2001*”, online: ServiceOntario e-laws [http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_01r28_e.htm#BK16].


\(^{251}\) “Driving while driver’s license suspended, *Criminal Code*”, online: ServiceOntario e-laws [http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90h08_e.htm#BK92].
d. Prevention of public injury

Under the provisions of the Civil Remedies Act, 2001, the Superior Court of Justice is empowered to make any appropriate order upon satisfaction that two or more persons conspired to engage in unlawful activity, with one or more parties having knowledge that the unlawful activity would be likely to result in injury to the public, and injury to the public has resulted from or would be likely to result from the unlawful activity.\textsuperscript{252}

The provision is aimed to prevent the public at large from the effects of unlawful activities that cause disruption in the peaceful existence of members of the society. For the purposes of this Act ‘injury to the public’ has been defined as under:

“Injury to the public includes,

(a) any unreasonable interference with the public’s interest in the enjoyment of property,

(b) any unreasonable interference with the public’s interest in questions of health, safety, comfort or convenience, and

(c) any expenses or increased expenses incurred by the public, including any expenses or increased expenses incurred by the Crown in right of Ontario, a municipal corporation or a public body.”\textsuperscript{253}

Under the provisions of s. 13 (4) of the Act the court is empowered, for the purposes of prevention and reducing the risk of public injury, to order, refrain or impose damages on a party to the conspiracy on account of the public injury resulting from the unlawful activity.\textsuperscript{254}

Analysis

This piece of legislation has been quite successful and effective in fulfilling the legislative intent behind its enactment. In Ontario (Attorney General) v. Chatterjee, the Court of Appeal delivered a landmark judgment involving the question of the purpose of the Civil Remedies Act, 2001 (hereinafter referred to CRA). The Court held that the purpose of the Act has been “to require disgorgement of financial gains obtained through unlawful activities, compensate victims of crime and suppress conditions that lead to unlawful activities”. The aim of the Act has been to facilitate the work of prosecution agencies by doing away with the tedious and time consuming procedure of affecting forfeiture and realizing the same.

The forfeiture of assets provided under CRA is entirely based on the connection between property and unlawful activity and is not dependant on any criminal charges or convictions. In Ontario (Attorney General) v. Chatterjee, the Court held that the proceedings under the Act are not criminal in nature and they do not result in “true penal consequences”. The effectiveness of CRA can be largely attributed to its very civil nature of the proceedings which are based on a balance of probabilities. Although similar forfeiture provisions have been provided under various statutes like the Criminal Code of Canada and the Controlled Drugs and Substances Act to name a few, forfeiture under all these legislation is subject to conviction of the accused. Unlike the civil forfeiture which is based upon a balance of probabilities, the legislation prior to the CRA provided for criminal asset forfeiture and therefore required criminal convictions.

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256 Ibid.
257 Ibid.
Under the CRA, forfeitures are brought in rem: “a legal action directed solely against the property seeking a judicial finding that the origin of the property lies in illegal activity, or is being used as an instrument of unlawful activity”.\textsuperscript{259} The proceedings are directed against the property rather than at the person. The Court has observed that the CRA does not define or create any offence and “has nothing to do with the identification, charging, prosecution, conviction or punishment of the offender. It does not seek to impose a penalty, fine or other punishment and does not provide for imprisonment”.\textsuperscript{260}

For the purposes of implementation and enforcement of the Act, the Ontario government had created the Civil Remedies for Illicit Activities (CRIA) office in 2000; comprising of a specialized team of civil lawyers to initiate proceedings on the behalf of the Attorney General.\textsuperscript{261}

Between November 2003 and July 2007, forfeiture proceedings were launched in 170 cases, $3.6 million in property had been forfeited, $11.5 million in property stood frozen pending completion of forfeiture proceedings, almost $1 million had been distributed to victims and more than $900,000 had been awarded as grants to help prevent victimization.\textsuperscript{262}

The Civil Remedies for Illicit Activities (CRIA) office, created for the implementation of provisions of the Act, has established itself as an authority at both national and international levels. Furthermore, the success of CRIA can be gauged from the fact that it has been appointed as an observer at a European Union asset recovery network and as an Advisory Group to the New York State Districts Attorneys Association and the Caribbean Law Enforcement Community of

\textsuperscript{259} \textit{Ibid.}  
\textsuperscript{260} \textit{Supra} note 255.  
\textsuperscript{261} \textit{Supra} note 258.  
\textsuperscript{262} \textit{Ibid.}
Practice. CRIA has also worked with the U.S. State Department, the United Nations Office of Drugs and Crime and the International Monetary Fund in context of the civil forfeiture regime.

The CRA is now further armed to the teeth through the amendments effected by the way of the
Safer Roads for a Safer Ontario Act, 2007. Under the amendments, the civil courts are now empowered to impound and order the forfeiture, as instruments of unlawful activity, of vehicles used or likely to be used by people who have two or more previous licence suspensions relating to drinking and driving offences or who have continued to drive while their licence is suspended for drinking and driving.

The only critique, being that the provisions of the Act are in contravention of the Charter, has been silenced through the judgment delivered in Ontario (Attorney General) v. Chatterjee. The Court of Appeal observed that, Charter provisions do not apply as the person is not charged with an offence and the proceedings brought under the Act are not criminal in nature and do not result in "true penal consequences". The Court further observed that the “successful application for forfeiture does not carry stigma associated with criminal conviction”.

After having analyzed the legal treatment of organized crime in Canada and having ascertained the shortcomings of legislation which will be synthesized along with other factors later, the chapter will now analyze the legal treatment of the phenomenon in India.

\(^{263}\) Ibid.
\(^{264}\) Ibid.
\(^{265}\) Ibid.
\(^{266}\) Supra note 255.
The legal treatment of Organized Crime in India

It would be appropriate to consider the model of law and policy background in order to effectively analyze the legislative measures adopted to contain the phenomenon of organised crime in India.

- Model of law

The Constitution of India provides for a parliamentary form of government which is federal in structure with certain unitary features. The constitutional head of the Executive is the President and as per Article 79 of the Constitution of India, the council of Parliament consists of President and two houses known as council of states and the House of the People. Article 74(1) of the Constitution provides that there shall be a Council of Ministers with a Prime Minister as its head to aid and advice the President. The real executive power is vested in the Council of Ministers with the Prime Minister as its head.

Every State/Province has a legislative assembly with the Governor as the head of the State. The Governor discharges the executive function with the aid of the Chief Minister who heads the council of Ministers.

The Constitution distributes legislative powers between Parliament/Federal and the State/Provincial Legislatures by lists of entries in the Seventh Schedule of the Constitution.\(^{267}\) The matters pertaining to criminal law fall within the ambit of concurrent powers and so the power to legislate on criminal law is vested in both the legislatures, i.e. Union/Federal as well as State/Provincial, subject to constitutional considerations.\(^{268}\)


Apart from constitutional considerations, the development of public policy is also important to the enactment of legislation at union/federal or state/provincial level. In relation to organized crime the Indian response can be understood from the study of policies and the legislative background.

- **Policies and legislation background**

At present there exists no federal or central law in India dealing specifically with organized crime, except for the anti money laundering legislation. The phenomenon is not universal in India, but is concentrated in a few states only. Perhaps that is why only the states that are worst affected have come up with legislation at the state/provincial level to counter the menace. It is pertinent to mention here that although India is a signatory to the *United Nations Convention on Transnational Organized Crime (UNTOC)* there has been no initiative in the direction of enacting any central/federal law to deal with the specific facets of organised crime as envisaged by the convention.269

The Indian Penal Code recognizes only conventional crimes, which include some forms of organized criminality. Apart from the Indian Penal Code, some central/federal statutes can also be said to loosely deal with some facets of organized criminality.270 For instance *Public Gambling Act 1867*, the *Explosives Act 1884*, the *Immoral Traffic (Prevention) Act 1956*, the *Excise Act 1956*, the *Arms Act 1959*, the *Customs Act 1962*, the *Emigration Act 1983* and the *Narcotic Drugs and Psychotropic Substances Act 1985* to name a few.271

The laws dealing with preventive detention have also been employed in the Indian context to interrupt the activities of organized criminals by removing the criminals from their areas of operation. Some of the preventive detention laws in India can be enumerated as below:

269 *Supra* note 143.

270 *Supra* note 19 at 22.

- *The National Security Act, 1980* – This Act provides for preventive detention by the Central Government or the State Government. The period of detention is one year “with a view to preventing a person from acting in any manner prejudicial to the defence of India or friendly relations with foreign power”.\(^{272}\) The provisions of the Act have been sparingly used against anti-national elements or hardcore gangsters.\(^{273}\)

- *The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988* – This act provides for the detention of persons involved in drug trafficking which accounts for most profitability for organized criminal groups.\(^{274}\)

- *The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974* – There is no bail provision under this Act and it has been used very extensively against the smugglers.\(^{275}\)

Apart from these generic pieces of legislation, the legislation enacted specifically for combating the phenomenon of organized crime at central/federal level and state/provincial level can be enumerated as below:

**Central/Federal legislative measure**

- *Prevention of Money Laundering Act, 2002*

**State/Provincial legislative measure**

- *Maharashtra Control of Organised Crime Act, 1999*
Central/Federal legislative measure

- **Prevention of Money Laundering Act, 2002**

This Act defines a money laundering offence and provides for the freezing, seizure and confiscation of the proceeds of crime. This anti money laundering legislation, enacted by the Parliament of India, forms the core of the legal framework to combat the phenomenon of organised crime. The Act came into force on July 1, 2005 and it imposes an “obligation on banking companies, financial institutions and intermediaries to verify identity of clients, maintain records and furnish information to Financial Intelligence Unit”. The Financial Intelligence Unit is an independent body set up by the Government of India which reports directly to the Economic Intelligence Council headed by the Finance Minister.

**Legislative history**

The Act was enacted in the background of following resolution and declaration:

- Implementation of resolution of the Political Declaration and Global Programme of Action adopted by the General Assembly of the United Nations at its seventeenth special session on February 23, 1990 and

- The Political Declaration adopted by the Special Session of the United Nations General Assembly held on 8th to 10th June, 1998 wherein the member states were called to adopt national money laundering legislation and programme.  

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For the purposes of this Act, the offence of money laundering has been defined as under:

“Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money laundering.”

The definition attempts to deal with a wide spectrum of methods that are employed by the perpetrators to layer money in order to legitimize the same. Furthermore, the highlighting features of this Act can be summarized as below:

a. **Rigorous punishment**

The Act provides for a minimum punishment of three years that can be extended up to seven years along with a fine which may extend to 500,000 Indian rupees (Canadian $12500 with conversion rate of $1=40 Indian rupees). Moreover, the quantum of punishment can be extended up to ten years in case the proceeds of crime in question relate to specified offences (such as contravention in relation to opium poppy, poppy and import or export of narcotics falling under the purview of *Narcotics Drugs and Psychotropic Substances Act, 1985*).  

b. **Attachment and confiscation provisions**

The director or an officer authorized by him has the power to provisionally order attachment of a property in respect of which there are reasonable grounds to believe that

- the person who is in possession has been charged of having committed a scheduled offence and

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278 *Ibid* at Section 3.
- the proceeds of crime are likely to be done away in a manner that would negate the purpose of confiscation provided under the Act.\textsuperscript{280}

For the purposes of this Act, the term ‘property’ has been defined as under:

"Property means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located."\textsuperscript{281}

After the attachment of the property, the adjudicating authority serves notice on the person to clarify his resources for acquiring such property. After giving a due hearing to the parties and considering all the facts and circumstances, the adjudicating authority decides upon whether the property in question is involved in money laundering or not. The property found to be involved in money laundering is provided to have the effect of continuation of a provisional order of attachment, retention or seizure. This continuation of a provisional order is effective during any proceedings (pertaining to a scheduled offence) before a court and becomes final with the proven guilt in the court of law.\textsuperscript{282} The title pertaining to the confiscated or seized property is provided to vest with the central government without any encumbrances.\textsuperscript{283}

c. Trial powers

The adjudicating authority has been conferred with the same powers as are vested in a civil court for the purposes of conducting a trial. The powers are confined with respect to matters such as discovery and inspection, enforcing the attendance of a party, examination on oath, compelling

\begin{footnotes}
\footnotetext[280]{\textit{Ibid} at section 5.}
\footnotetext[281]{\textit{Ibid} at section 2.}
\footnotetext[282]{\textit{Ibid} at section 8.}
\footnotetext[283]{\textit{Ibid} at section 9.}
\end{footnotes}
the production of records, receiving evidence on affidavits and issuing commissions for examination of witnesses and documents.\textsuperscript{284}

d. Mandatory record keeping

The Act makes it mandatory for banking companies, financial institutions and intermediaries to “maintain a record of all transactions, the nature and value of which may be prescribed, whether such transactions comprise of a single transaction or a series of transactions integrally connected to each other and where such series of transactions take place within a month”.\textsuperscript{285}

Furthermore, it has been made mandatory that the records of such transactions shall be maintained for a period of ten years from the date of cessation of the transactions between the institution and the client.\textsuperscript{286}

e. Search and seizure provisions

The director has been conferred the power to order the search of any building, place, vessel, vehicle or aircraft upon reasonable grounds of suspicion that the person has committed or is in possession of proceeds or records relating to money laundering.\textsuperscript{287}

The Act also provides for an authority so empowered in this behalf by the central government to order the search of a person. Such measure is provided on reasons to believe “that any person has secreted about his person or in anything under his possession, ownership or control, any record or proceeds of crime which may be useful for or relevant to any proceedings under this act”.\textsuperscript{288} In such a scenario the person to be searched is provided with the option to be taken before a

\begin{itemize}
\item \textsuperscript{284} Ibid at section 11.
\item \textsuperscript{285} Ibid at section 12.
\item \textsuperscript{286} Ibid.
\item \textsuperscript{287} Ibid at section 17.
\item \textsuperscript{288} Ibid at section 18.
\end{itemize}
magistrate or a gazette officer, who could decide upon the need of search. The Act also provides for the presence of two witnesses at the time of the search in order to ensure fair search.\footnote{Ibid.}

\section*{f. The arrest provisions}

The director, deputy director, assistant director or an officer authorized by the central government have been granted the power to arrest a person. The grounds of such an arrest should be based on the evidence that points towards the guilt for an offence punishable under this Act.\footnote{Ibid at section 19.} The person so arrested should be produced before the magistrate within twenty four hours of the arrest.

\section*{Critique}

In India, the \emph{Prevention of Money Laundering Act, 2002} (hereinafter referred to as PMLA) came into effect in July, 2005. The main aim of the Act is to effectively stop the perpetrators from transforming the proceeds of crime and confiscation of the same. The Act provides a list of scheduled offences, the proceeds from which are considered for the purposes of classification into money laundering offence.

However, the Act is considered to have fallen short in respect of including all the relevant offences in the schedule of offences. The part-b of the schedule contains offences falling under the \emph{Prevention of Corruption Act, 1988}.\footnote{“Offences under the \emph{Prevention of Corruption Act, 1988}”, online: Financial Intelligence Unit, India <http://fiuindia.gov.in/schedule-prevention.htm>.} However, the PMLA has incorporated only four of the penal offences provided under the \emph{Prevention of Corruption Act} and has not included the most potent provision of the Act.\footnote{Dr. Pradnya Saravade, “\emph{Prevention of Money Laundering Act, 2000-A Critical Analysis}”, online: Geocities <http://72.14.205.104/search?q=cache:75b2lpEN2AAJ:www.geocities.com/nsaravade/PMLA_A_Critical_Appraisal.pdf+%22pradnya%22+and+%22critical+analysis%22&hl=en&ct=clnk&cd=1&gl=ca&client=fir efox-a>.} Section 13 (1) (e) of the \emph{Prevention of Corruption Act} (dealing
with the issue of possession, by a public servant, of assets or resources disproportionate to his
known sources of income) has not been included in the PMLA.

Moreover, the offences relating to the *Prevention of Corruption Act* that are included in the
PMLA have a condition attached to them which makes their application ineffectual. As per the
condition, the total value involved in offences under part-b should be three million Indian rupees
or more (Canadian $75,000 at conversion rate of $1=40 Indian rupees). It is pertinent to
mention here that the offences in respect of which the condition of minimum value has been laid
usually do not involve such a large amount. The offences include taking gratification other than
legal remuneration in respect of an official act, taking gratification to influence the public servant,
taking gratification for exercise of personal influence with the public servant and abetment by
public servants of offences hereinbefore mentioned.

The amount of money involved in the above said offences is too minuscule to be laundered and
used for the purpose of acquiring properties. According to Dr Pradnya Saravade (Indian Police
Services, Additional Commissioner of Police of Anti Corruption Bureau, Maharashtra State) and
Mr. Nandkumar Saravade (Indian Police Services, Director, Cyber Security and Compliance,
National Association of Software and Service Companies/NASSCOM), in their six and seven
years of respective experience they have never come across any case that involves such a huge
amount as is required for the purposes of prosecution under the PMLA. The PMLA has not
adopted the practical approach while including the offences under the *Prevention of Corruption
Act* in the list of scheduled offences. The PMLA should have included section 13 (1) (e) dealing
with the issue of possession, by a public servant, of assets or resources that are disproportionate to
his known sources of income in order to target the menace of money laundering.

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293 “Section 2 (y), *Prevention of Money Laundering Act, 2002*”, online: Financial Intelligence Unit,
294 *Supra* note 292.
295 *Supra* note 293 at paragraph 5 of part-b.
296 *Supra* note 292.
Moreover, in India, the primary substantive offence to money laundering has usually been tax evasion. However, the PMLA has altogether overlooked this fact and has not incorporated the offences provided under the *Income Tax Act, 1961* in the schedule of offences. The foreign exchange controls that are applicable in India are largely responsible for the tax evasion and subsequent money laundering activities. During the early 1990s, the balance of payment (B.O.P.) situation of India had become very adverse and the foreign exchange reserves were only sufficient to support imports for fifteen days. In order to bail out of this situation, the government had to pledge its gold reserves to raise foreign exchange. Subsequently, in order to bolster the economy the government implemented the liberation, globalization and privatization policy and also allowed for liberal remittances of foreign exchange. The liberalized foreign exchange control in turn paved the way for money launderers and alternative remittance systems to operate quite freely.

This chapter will now analyze the state/provincial legislative measures that have been adopted to combat the phenomenon of organized crime.

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State/Provincial legislative measures

The Maharashtra has been the first state in India to enact specific legislation pertaining to organized crime. The capital city of Maharashtra (Mumbai) is perhaps the worst affected by the phenomenon. Mumbai is a port city overlooking the Arabian Sea and is also the financial capital of India.

- **Maharashtra Control of Organized Crime Act, 1999**

The term ‘organised crime’ has been defined in s. 2 (e) of the Act which is reproduced as below:

"Organised crime means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any person or promoting insurgency."^{299}

For the purposes of this section, the three most important aspects that need to be proved are commission of unlawful activity, organised crime syndicate and continuing unlawful activity.

**Commission**

The offence of organised crime is said to be committed when an individual in the capacity of a member or on behalf of an organised crime syndicate commits a continuing unlawful activity for deriving any gain (economic or otherwise). The unlawful activity could be committed individually or in association of others. The gain so derived by committing such continuing unlawful activity could be for the person himself, any other person or for promoting insurgency. Furthermore, the other two important aspects of this section, i.e. organised crime syndicate and continuing unlawful activity, can be explained as below:

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Organised crime syndicate

The meaning of ‘organised crime syndicate’ is central to this section. Under the Act, the term ‘organised crime syndicate’ means an association of two or more persons that indulge in the commission of organised criminal activities either individually or collectively.\textsuperscript{300} In order to establish the offence of organised crime, it has to be proven that ‘continuing unlawful activity’ was committed by a member of or on behalf of such syndicate.

Continuing unlawful activity

For the purposes of this Act not every unlawful activity committed by (or on behalf of) a union of two or more persons is considered to be organised crime. It is necessary that criminal activity should be a continuing unlawful activity. The following conditions must be met for an unlawful activity to be considered a continuing unlawful activity:

- The activity should constitute a cognizable offence (wherein arrest could be made without a warrant) and should be punishable with imprisonment of three years or more, and

- The activity should have been undertaken in the capacity of a member of an organized crime syndicate or on behalf of such syndicate, and

- Against that very syndicate, more than one charge sheet should have been filed within preceding period of ten years and the Court should have taken cognizance of the offences in those charge sheets.\textsuperscript{301}

The charges under the section can be brought only upon satisfaction that continuing unlawful activity has been committed by or on behalf of an organised crime syndicate. Moreover,

\textsuperscript{300} Ibid at section 2 (f).
\textsuperscript{301} Ibid at section 2(d).
considering the past experiences wherein organised criminals had facilitated insurgency, the section has also incorporated ‘insurgency’ within its scope. The section provides that commission of continuing unlawful activity could also be for the purpose of promoting insurgency.

Furthermore, the salient features of the *Maharashtra Control of Organized Crime Act, 1999* can be enumerated as below:

**a. Provision of constitution of ‘Special Courts’**

The State Government is authorized to constitute special courts encompassing different jurisdictions in order to facilitate and expedite the disposal rate of the cases being tried under the Act.\(^{302}\) The appointment of judges presiding over these courts is carried out in concurrence of the Chief Justice of the Bombay High Court\(^{303}\) (the High Court being the Apex Court of the State and the Supreme Court being the Apex Court of the Nation).

**b. Interception and recording authorization**

The Act enables a police officer not below the rank of Superintendent of Police, who is responsible for the supervision of an organised crime offence investigation, to seek an authorization permitting the interception of wire, electronic or oral communication for the said purposes.\(^{304}\) The contents of such interception are provided to be recorded on tape or other comparable devise in such a way that the contents remain protected from editing or any other kind of alterations.\(^{305}\)

\(^{302}\) *Ibid* at section 5(1).
\(^{303}\) *Ibid* at section 5(3).
\(^{304}\) *Ibid* at section 14(1).
\(^{305}\) *Ibid* at section 14(12)(a)
c. Admissibility of confession before a police officer

According to the *Indian Evidence Act, 1872*, any confession made before a police officer is considered inadmissible at the trial. The law requires that the confession should be made before a judicial magistrate in order to be considered admissible. However, under the provisions of this Act confession made to a police officer not below the rank of superintendent of police is also admissible as evidence at the trial.\(^{306}\)

d. Witness protection provisions

The Act provides for ‘in camera’ proceedings and taking adequate measures to ensure that the identity and address of a witness is kept secret in order to protect him from any kind of reprisal or victimization.\(^{307}\)

e. The minimum punishment provided under the Act is imprisonment for five years and which may extend to life in case of offences such as conspiring, attempting or facilitating the commission of organised crime, harbouring, concealing any member of syndicate or attempting the same and being the member of syndicate.\(^{308}\) In case of death being the consequence of an offence of organised crime, the perpetrator can be awarded death penalty or life imprisonment along with the fine.\(^{309}\)

f. If a criminal gang cannot account for the wealth or properties in its possession, such properties or wealth are liable to be attached or forfeited;

g. Bail provisions have been made stringent inasmuch as no court can grant bail to a criminal arrested under this law without giving an opportunity to the public prosecutor of

\(^{306}\) *Ibid* at section 18 (1).
\(^{307}\) *Ibid* at section 19.
\(^{308}\) *Ibid* at section 3.
\(^{309}\) *Ibid* at section 3(i).
being heard and also without satisfying itself that *prima facie* there is no case against the person arraigned before it;

**h.** If the person is convicted under this law, apart from imprisonment, the movable and immovable properties of such accused shall stand forfeited to the state government;

**i.** Certain provisions of the *Criminal Procedure Code* have been amended. It provides for police custody remand for up to 30 days instead of 15 days. If an investigation cannot be completed in 90 days, on the request of the public prosecutor, the court can grant another 90 days for its completion. The accused would not be released on bail after the expiry of first 90 days.\textsuperscript{310}

The definition of organised crime as provided under s. 2 (e) is of paramount importance for the purposes of the *Maharashtra Control of Organised Crime Act, 1999*. The question regarding the constitutional validity of the section came before the Bombay High Court (Court of appeal for the state of Maharashtra) in *Zameer Ahmed Latifur Rehman Sheikh and Others v. State of Maharashtra and Another\textsuperscript{311}*.

The provisions of the section pertaining to the facet of ‘promoting insurgency’ was challenged as being ultra vires on the ground that the state legislature did not have the legislative competence to enact the same. It was submitted that the legislation pertaining to insurgency, rising in active revolt, could only be enacted by the Union/Federal legislature according to the *Constitution of India*, hence, the present treatment of insurgency in the *Maharashtra Control of Organised Crime Act, 1999* is not valid. The challenge was struck down by referring to explicit constitutional provisions, according to which there is no implied restriction on the legislative powers of the Union legislature or State legislature and in case of any

\textsuperscript{310} *Supra* note 270 at 21 and 22.

overlapping of the legislative powers, the pith and substance of the legislation should be taken into consideration. On the basis of these constitutional considerations, the provisions of s. 2 (e) pertaining to the facet of ‘promoting insurgency’ was upheld by the Bombay High Court.

The above mentioned case is the only instance wherein the constitutional validity of a section of this legislation was challenged before the courts.

Apart from the state of Maharashtra, three other states, namely Andhra Pradesh, Arunachal Pradesh and Karnataka, have also enacted the laws pertaining to organised crime. All these pieces of legislation have been enacted on the very similar lines of the Maharashtra Control of Organised Crime Act.

Moreover, in the light of the threat perception of organised criminal activities in and around the National Capital (New Delhi), the relevant provisions of Maharashtra Control of Organised Crime Act, 1999 have also been extended to the National Capital Territory of New Delhi with effect from January 2, 2002.

Analysis

For the period since the enactment of this Act in 1999 to July 23, 2001, a total of 40 cases had been registered under the Maharashtra Control of Organised Crime Act (hereinafter referred to as MCOCA). Out of these, six cases have resulted in conviction, while some cases were discharged. Eight cases were still pending investigation and 23 cases were pending trial.

According to Mr. M. N. Singh (police commissioner of Mumbai), “In 2002 police arrested 192 extortionists and 302 gangsters, shot dead 47 criminals and booked eight others under MCOCA. In comparison in 2001, 242 extortionists and 395 other gangsters were arrested, 94 other

312 Ibid.

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criminals were killed in encounters and 83 others were booked under the MCOCA. Furthermore, extortion too had come down to 175 cases in 2002 when 272 criminals were arrested as against 282 cases last year for which 537 criminals were arrested. Of these 272 arrested, 44 were linked to organised gangs. It is also claimed that the total cases of crime during 2002 came down to 26,039 which were lowest since 1985”.

However, these reported figures by the authorities do not reveal the real picture. The critiques of MCOCA have often termed the provisions of the Act as being even more draconian than the Terrorist and Disruptive Activities Act (TADA). The central issue with the opposition of such legislative measures is that more than often these measures are used against the minorities and political opponents.

Another important issue is the effective implementation of such legislative measures which is effected by the deplorable state of affairs of the authorities. The situation can be understood through the study of initiatives that were taken after the Mumbai blasts. The Mumbai blasts in 1993, which were orchestrated by an organised crime kingpin, forced the government to initiate concrete measures against the menace of organised crime. The government of India set up the N. N. Vohra Committee in July 1993 to look into the matters relating to organised crime syndicates. The primary focus of the committee was to investigate crime linked to politics and bureaucracy. The committee presented its report on October 10, 1993 and highlighted in its findings that, “crime syndicates had become a law unto themselves and that the nexus between the crime, bureaucracy and politicians had become common practice”. The findings of the report were obviously not an eye opener as all concerned had knowledge of the same and were

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314 “Crime figures fall to lowest point since ’85” The Times of India (31 December 2002), online: The Times of India <http://timesofindia.indiatimes.com/articleshow/32906165.cms>.
316 Ibid.
hand in glove with syndicates for their petty vested interests. The report was submitted but no action was initiated towards this disturbing trend owing to the reasons stated above.

It has become a norm in India to constitute such committees after every big incident or happening. The real purpose behind such initiatives is to gain some time so that the intensity of public outcry tapers down and also to justify the role of the government and authorities. Usually such committees, commissions and enquiries are headed by handpicked persons such as retired judges of High Courts, Supreme Court (the apex courts of law in India) or retired bureaucrats who are most likely to present convenient outcomes. These facts finding measures also double up as incentives to the retired judicial and administrative officers who had acted under the whims of the government during their respective tenures. Moreover, the trend of appointment of retired officers to commissions by the state and central governments also acts as an encouragement to the serving judicial and administrative officers to accommodate the influence of government while discharging their duties. It is disturbing to say that the very organs of the state have lost their independence. The corruption has crept into the Indian administrative system and as a result organised crime activities are flourishing due to connivance and support from the administration.\textsuperscript{317}

Another example that demonstrates the connivance and often involvement of authorities (in this case of police officials) in criminal activities is the Srikrishna Enquiry Commission. The commission was constituted to ascertain the perpetrators of communal rioting that erupted after Mumbai blasts in 1993. The Enquiry Commission convicted many policemen among others for the rioting, however, nothing much was accomplished from the report of the commission.\textsuperscript{318}

\begin{itemize}
\item \textsuperscript{317} \textit{Ibid.}
\end{itemize}
According to Mr. Majeed Memon (senior advocate of repute practicing in Mumbai and specializing in preventive acts), the MCOCA is being used in Maharashtra to arrest people rather arbitrarily.\textsuperscript{319} Ms. Teesta Setalvad (journalist and human rights activist), opines that 42\% of the detainees held under the provisions of preventive acts have been illegally detained.\textsuperscript{320} In the present scenario, the innocent are left with no other option than to languish in the prisons due to stringent bail provisions of the MCOCA combined with inefficiency of the criminal justice system.

There is an urgent need to adopt a holistic approach in order to make legislation effective. The mere enactment of legislation cannot resolve the larger issues such as implementation, fair investigations, and speedy and just trial. The police authorities, responsible for implementation of legislation, have themselves become a tool in the hand of politicians and act according to their whim. The criterion for taking cognizance of an offence has become a matter of extraneous factors rather than the genuineness of circumstances. Moreover, the crucial investigation process, that is essential for successful prosecution, is altogether neglected and is conducted with minimal efforts. The prosecution of organized criminals is further affected at trial stage due to the fact that the public prosecutors (crown attorneys) are often the most irresponsible officers of the court who are only good at seeking adjournments on flimsy grounds.

After having analyzed the legal treatment of the phenomenon in two countries, this thesis will now analyze the scenario relating to overemphasis on legislative and enforcement measures.

\textsuperscript{319} Ibid at 93.
\textsuperscript{320} Ibid at 94.
CHAPTER 3

It is arguable that the causes behind the prevalence of the phenomenon of organized crime in the two countries include the combined effect of legislative inadequacies and society’s contributing factors. Moreover, it is arguable that there has been an overemphasis on legislative and enforcement measures that have been ineffective as a solution for the problem of organized crime. Addressing the phenomenon of organized crime through legislative and enforcement measures alone is like targeting and suppressing the symptoms and not the root cause. The legislative and enforcement measures target the criminal organizations and associated offences that are affecting the law and order situation but what really is happening is that it only has the effect of replacing the existing criminals with new entrants. Even if a particular criminal organization ceases to exist and operate as a result of successful prosecution of the whole of the top brass and its operatives, the created vacuum will soon be filled by another new criminal organization due to the social reality that there is never ending demand for illicit products.

There is no denial in the fact that the phenomenon of organized crime is proliferating, a fact which is quite evident from its continued threat perception. The situation clearly points towards the ineffectiveness of legislative and enforcement measures that have been adopted to combat the phenomenon. It is quite obvious that organized criminal groups are being successful in fulfilling the very purpose of their existence, i.e. economic gain or profitability, through indulgence in illegal activities. The involvement of organized criminal groups particularly in the drugs trade has been most profitable as it forms the largest source of revenues for them. 321

The organized crime and drugs trade are closely related as their very survival is dependent upon the drugs trade. According to the Deputy Solicitor General of Canada, the sales of illicit drugs are a major source of funding for organized crime and that an estimated 80 percent of funding for

321 Supra note 47.
organized crime comes from illicit drugs sales.\textsuperscript{322} This relation also poses the most serious threat to public safety as illicit drug traders account for more criminal activity than any other facet of criminality including assaults, homicides and property crimes.\textsuperscript{323} Furthermore, it has been argued that the more organized crime is involved in drug trafficking, the higher are the overall dangers for society including the risk emerging from “the financial power of such criminal groups to corrupt the economic and the political system, leading to a crowding out of legitimate investment, inefficient capital allocation and eventually to lower economic growth and poorer living conditions.”\textsuperscript{324}

The dependence of organized crime on the illicit drugs trade can be exploited in the fight against the phenomenon of organized crime. The phenomenon can be crippled by striking at the illicit drugs trade as illicit drugs trade is critical in sustaining the phenomenon of organized crime. In order to strike at the illicit drugs trade it is very necessary to look into the effectiveness of drug policy. A review of policy will also illustrate the point that mere enactment of legislative and enforcement measures is not sufficient and a holistic approach is required for containing the drugs trade which is in turn sustaining the larger phenomenon of organized crime. The aim is to briefly analyze the effectiveness of the legislative and enforcement measures adopted under the drug policy.

**Drug policy and legislation in Canadian context**

The laws and policies pertaining to illicit drugs in Canada have almost a hundred years long history. Throughout, the method of dealing with problems of illicit drugs has remained

\textsuperscript{322} Supra note 150 at 178.  
\textsuperscript{323} Supra note 10.  
prohibitionist and by far the greatest part of funding has been devoted to supply-reduction initiatives.\footnote{Thomas Kerr and Warren O’Briain, “Drug Policy in Canada – The Way Forward” (July 2002) Canadian HIV/AIDS Policy & Law Review Vol. 7, No. 1.}

In 1908, the \textit{Opium Act} was first prohibitionist drug legislation in Canada, followed by the \textit{Opium and Drug Act} in 1929 that was created to regulate and control a greater variety of drugs. Until 1997, the \textit{Opium and Drug Act}, the \textit{Narcotic Control Act} and the \textit{Food and Drug Act} served as the primary drug policy instruments.\footnote{Ibid.} In 1996 the \textit{Controlled Drugs and Substances Act} was enacted.

The Canadian drug policy has the effect of increasing the list of banned or illicit substances and increasing the powers of federal enforcement agencies. As has been noted that, “the \textit{Controlled Drugs and Substances Act}...is soundly prohibitionist and rather than retreating from the drug war rhetoric of the past it expands the net of prohibition further still”.\footnote{Ibid.} There has been undue reliance on the policy of adopting measures aimed at reducing the supply as a solution to the drug problem without considering the ineffectiveness of similar previous measures. This approach can be illustrated from the 2001 Auditor General’s report wherein it was reported that out of the estimated $454 million spent annually on illicit drugs control, an astonishing $426 million (93.8 percent) was allocated to police enforcement and incarceration.\footnote{Will Small, Evan Wood, Ralf Jürgens and Thomas Kerr, “Injection drug use, HIV/AIDS and incarceration: evidence from the Vancouver Injection Drug Users Study” (December 2005) HIV/AIDS Policy & Law Review, Vol. 10, No. 3.} The overemphasis on the approach has yielded no real results, which goes to prove the ineffectiveness of the same.

Instead of learning from the past experiences and shortcomings of the approach, the majority of amendments to the \textit{Controlled Drugs and Substances Act} have focused on reducing supply rather
than demand.\textsuperscript{329} The effectiveness of the drug policy can be ascertained by looking into the extent of the effort and resources that have been extended and their subsequent outcomes. In 2002, a total of $330 million were allocated for the area of law enforcement and it is noteworthy that 23 percent of all criminal charges processed in the Courts were attributed to illicit drugs in that year.\textsuperscript{330} Furthermore, policing costs and correctional service costs associated with illicit drugs were estimated to be $1.43 billion and $573 million respectively.\textsuperscript{331} It is pertinent to mention here that in spite of all these efforts, the illicit drug consumption rates for the same year, i.e. 2002, were higher than ever recorded. In comparison, in 1994, 28.5 percent of Canadians reported having consumed illicit drugs in their life; a figure that jumped to 45 percent by 2004.\textsuperscript{332}

The fact regarding the ineffectiveness of the drug policy, focused on prohibitionist approach, was mentioned in the 2001 report of the Auditor General. The Auditor General reported that, “the federal government had failed to effectively lead and coordinate a national approach to addressing problematic substance use. An analysis of recorded expenditures revealed that 95 percent of federal funds related to illicit drugs were directed towards supply reduction efforts”.\textsuperscript{333} The report clearly points to the failure of prohibitionist approach of drug policy to yield any positive results.

A study by Wood et al, pointing to Canada’s largest-ever heroin seizure, observed that the seizure had no significant effect on the supply of heroin.\textsuperscript{334} The authors severely criticize politicians and policymakers “who continue to direct the overwhelming majority of resources into failing supply-reduction strategies, despite the wealth of scientific evidence demonstrating their ineffectiveness”

\textsuperscript{329} Supra note 325.
\textsuperscript{331} Ibid.
\textsuperscript{332} Ibid.
\textsuperscript{333} Ibid.
and concluded that their “findings support the strong consensus that curbing the HIV and overdose epidemics will require a shift in emphasis toward alternative strategies based on prevention, treatment and harm reduction, even if this shift necessitates a diversion of resources away from criminal justice interventions.” Apart from the study of various findings concluding ineffectiveness of supply-reduction strategies, a similar conclusion can be drawn by a common man through media sources that almost routinely report unabated drug related crimes and seizures. The approach of overemphasis on legislative and enforcement measures can further be demonstrated through the study of recent drug strategies.

- **Drug Strategy (2003)**

The Canadian drug strategy was renewed in 2003 and it was said to be based on a balanced approach and identified education and prevention; treatment and rehabilitation; harm reduction; and enforcement and control as its key pillars. However, none of the concerns of the earlier Federal Drug Strategy with respect to spending, activities, leadership and a lack of appropriate monitoring were addressed in the new strategy through which the federal government continued to invest heavily in policies and practices that have repeatedly been shown in the scientific literature to be ineffective or harmful. Although harm reduction was identified as one of the four pillars of the strategy, the evidence demonstrates continued emphasis on conventional enforcement based approaches with allocation of 73 percent of funding to the said measures in 2005. Apart from having no effect on the supply of illicit drugs, the enforcement based practices routinely resulted in an increased number of drug users entering correctional facilities.

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337 *Supra* note 330.
instead of being guided towards health and treatment services.\textsuperscript{339} Moreover, a report on policing in Vancouver, Abusing the user: Police misconduct, harm reduction and HIV/AIDS in Vancouver, documented violations of human rights by state agents that included harassment, illegal searches, extortion, beatings and torture (including the use of drug users’ addiction as a means to elicit false confessions).\textsuperscript{340} Considering the consequences of undue emphasis on the enforcement measures, it can be argued that the balanced approach between the four pillars of prevention, treatment, harm reduction and enforcement does not seem to be a balanced one. The repeated dismal performance of the approach of placing undue emphasis on enforcement measures led to a shift of focus as has been observed during the formulation of 2007 drug strategy.

- **National Anti-Drug Strategy (2007)**

On October 4, 2007, the government unveiled its National Anti-Drug Strategy with emphasis on containing the growth in supply and demand. The strategy was based on three components, namely a prevention action plan, a treatment action plan, and an enforcement action plan, in order to provide safer and healthier communities. The preventive action included youth focused community prevention initiatives to enable the youth in making right choices; the treatment action focused on options of funding/treatment of offenders with drug problems and risk posing individuals along with community treatment to treat and rehabilitate; and the enforcement action plan focused on proactive enforcement i.e. Marihuana grow-ops, Clan Labs and organized crime in order to provide for adequately strict penalties for serious drug crime and reduced production and distribution of drugs.\textsuperscript{341}

\textsuperscript{339} *Ibid.*
The new strategy came with $63.8 million additional funding over two years that supplemented the $385 million per year already directed towards drug related programs and initiatives.\textsuperscript{342} The additional funding of $63.8 million under the new strategy included an allocation of $32.2 million for the treatment action plan; $21.6 million for enforcement action plan and $10 million for the prevention action plan.\textsuperscript{343} The government also vowed to introduce mandatory prison sentences for drug producers and sellers.

Although the strategy was introduced as a new approach towards containment of the drug problem, it seems that as far as the allocation of funding is concerned the strategy followed the earlier pattern with almost three-quarters of the government’s funding going to enforcement measures.\textsuperscript{344} The strategy went on to consolidate the earlier approach of preferring enforcement measures over preventive and treatment measures inspite of the dismal performance of the earlier approaches. It is pertinent to mention here that on one side the strategy maintained an almost similar percentage of fund allocation for preventive and treatment measures as the previous strategy, and on the other hand it did away with the fourth pillar of harm reduction as had been incorporated in the previous drug strategy of 2003. The non incorporation of harm reduction measures (such as needle exchanges, methadone clinics and supervised drug consumption facilities) that had the proven effect to lessen the harms associated with illicit drug use by reducing the transmission of HIV and hepatitis C could be detrimental from both the public health and human rights prospective.\textsuperscript{345}

Inspite of the claims of adopting a balanced approach, the government is presenting anew the same old approach without considering its shortcomings. Moreover, the emphasis on enforcement measures is quite evident from the stand of the government proposing mandatory minimum

\textsuperscript{343} Ibid.
\textsuperscript{344} Ibid.
\textsuperscript{345} Ibid.
sentences for people convicted of serious drug offences. Whether the proposed mandatory sentences will have any effect on the reduction of drug use or its associated harms remains to be seen, but one thing is clear from research that incarcerating injection drug users is a contributing factor to the spread of HIV in Canada and furthermore it can be concluded from the U.S. experience that the proposed mandatory sentencing is proven to have disproportionate impacts on women, people of colour and members of marginalized communities.\textsuperscript{346} The proposed mandatory minimum sentence would further aggravate the problem associated with HIV infections among incarcerated drug users and would prove to be a futile exercise in the light of past experiences and deductions.

The existing framework of the 2007 drug strategy has incorporated nothing new apart from the fact that it has done away with the harm reduction component of earlier strategies that has rightly invited concerns from human rights and public health perspective. Above all, the continued failure of drug strategies to contain the drug problem has direct bearing on the proliferation of organized crime groups that are heavily involved in the illicit drugs trade due to the profitability factor.

\textbf{Drugs trade and Organized Crime}

The history of legislative measures pertaining to the illicit drugs dates back a century and the present legislation i.e. \textit{Controlled Drugs and Substances Act} was enacted in 1996. The very nature of the illicit drugs trade demands an organized setup as the production, acquisition and distribution aspects of most of the illicit drugs involve an international component. The production primarily takes place in the golden crescent, including Afghanistan; golden triangle countries comprising of Laos, Thailand and Myanmar; and in some South American countries from whereon the illicit drugs are smuggled and distributed primarily in North American and

\textsuperscript{346} \textit{Ibid.}
European markets. The whole process from the production to distribution to the end consumers is made possible through coordinated activities of organized crime groups of various countries.

Owing to the very nature of the illicit drug trade and the fact that the organized criminal groups derive most of their revenues from involvement in the illicit drugs trade, it would not be wrong to infer that the illicit drugs trade and the phenomenon of organized crime are interdependent on each other for their survival.

It is pertinent to mention here that the National Anti-Drug Strategy, 2007, identifies organized criminals as one of the target populations and target the activities of organized crime under the enforcement action plan.\textsuperscript{347} It is quite evident that the two facets of criminality, i.e. illicit drug trade and organized crime, are interdependent, and the fact that legal treatment has been unable to contain both the facets.

- **Drug offences and Criminal Organization offences**

The drug offences as provided in the *Controlled Drugs and Substances Act* can be turned into a whole lot of additional offences on top of the basic offence with a whole lot of penalties attached to them by relating them with the criminal organization offences as provided in the *Criminal Code*.\textsuperscript{348} The discretion lies with the Crown to decide whether to turn a drug offence into a criminal organization offence with extra penalties or not.\textsuperscript{349} The *Controlled Drugs and Substances Act* has been in effect since 1996 and the criminal organization offences have been in effect since 1997, however the effectiveness of these legislative measures can be gauged from the fact that neither of the facets, i.e. drugs trade and organized crime, has shown any signs of decline or containment and are rather proliferating.

\textsuperscript{347} *Supra* note 341.

\textsuperscript{348} Dr. Bryan Schwartz, "Dirty Money, Clean Hands Conference Opening Address" Asper Rev. of Int’l Bus. and Trade Law 1-10.

\textsuperscript{349} *Ibid.*
Solution

It is arguable that the solution to effectively deal with the drugs trade upon which organized criminal groups survive is not the adoption of more and more stringent enforcement measures as they have been unable to achieve their objective. First the drug offences were dealt through adoption of the traditional approach of drug policy that laid more emphasis on the enforcement component rather than on prevention, treatment and harm reduction. After the enactment of criminal organization offences, drug offences were turned into criminal organization offences on top of the basic offence with extra penalties. However, from the above discussion, it could be inferred that the solution does not lie in the emphasis on enforcement or prohibitionist approach, as these have failed to contain neither drug trade nor organized crime, but through a focus on prevention and treatment strategies. The drug policy should be amended in order to shift the focus from a prohibitionist strategy to prevention and treatment strategies in order to contain the drug trade that will have the collateral effect of containing the organized crime as these two facets of criminality are interdependent.

Moreover, there should be an adoption of a holistic approach with a focus on the active involvement of society and the need to create awareness among the masses regarding their collective responsibility and the effects of their irresponsible choices and preferences.

This chapter will now analyze the drug policy adopted in India in order have a broader outlook into the relationship of drugs trade and organized crime.
Drug policy and legislation in Indian context

The Indian drug policy is based on the Directive Principles of State Policy as enshrined in Article 47 of Indian Constitution. The Directive Principles are guidelines to the Central and State governments for enacting laws and framing policies which directs that the State shall endeavour to bring about the prohibition of the consumption, except for medicinal purpose, of intoxicating drugs injurious to health.350 The drug policy is also guided by the international conventions to which India is a signatory, namely the Single Convention on Narcotic Drugs 1961 as amended by the 1972 protocol, Conventions on Psychotropic Substances 1971 and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.351 The legislative policy on drugs is contained in three central/federal Acts namely, Drugs and Cosmetics Act, 1940, The Narcotics and Psychotropic Substances Act, 1985 and The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988.

The function of drug abuse control is central/federal and is carried out through a number of ministries, departments and organizations that include Ministry of Finance and Department of Revenue (having the nodal co-ordination role as administrator of the Narcotics Drugs and Psychotropic Substances Act, 1985 and the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988).

The Narcotics Control Bureau is the apex coordinating agency that is responsible for exercising powers and functions of the central government such as coordination of actions by other ministries, departments, state governments, implementation of counter measures as provided under international conventions and assistance to authorities and organizations in foreign

351 Ibid.
countries. The government has adopted a two pronged strategy for drug control that includes supply control and demand reduction measures.

The responsibility for implementing:

- supply control measures is vested with Narcotics Control Bureau and police authorities and;

- the responsibility for implementing demand reduction measures is vested with the Ministry of Social Justice and Empowerment through education, detoxification and rehabilitation.

The supply control and demand reduction measures can be elaborated by briefing the constituents and looking into working of the authorities responsible for their implementation.

**Supply control measures**

The statutory framework for drug law enforcement in India is contained in the *Narcotic Drugs and Psychotropic Substances Act*, 1985 (NDPS Act). The Act consolidates the erstwhile principal Acts, viz. the *Opium Act* 1857, the *Opium Act* 1878 and the Dangerous Drugs Act 1930. The Narcotics Control Bureau is the apex coordinating agency for enforcement purposes.

Subsequent amendments to the Act in 1989 provided for the forfeiture of property derived from drug trafficking and control over chemicals and substances used in the manufacture of narcotic drugs and psychotropic substances. In all, the statutory regime covers drug trafficking, drug

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related assets as well as substances which can be used in the manufacture of narcotic drugs and psychotropic substances.\textsuperscript{354}

The NDPS Act provides for stringent, long term sentences and heavy fines for offenders that include the cultivator, supplier, seller as well as drug consumer. The bail provisions are very stringent and the minimum sentence is ten years.\textsuperscript{355}

The government has also formulated a scheme of rewards under the reward policy in order to facilitate the enforcement, and the Narcotics Control Bureau has been designated as the agency for processing and sanctioning the reward pertaining to seizures effected.\textsuperscript{356} The NDPS Act was amended in 2001 to provide for graded punishment, so that the severity of sentence is made proportional to the quantity of seized illicit drug.

**Demand reduction measures**

The responsibility of undertaking demand reduction measures has been vested with the Ministry of Social Justice and Empowerment that is working towards:

- “building awareness and educating people about the ill effects of drug abuse
- dealing with the addicts through a well-rounded programme of motivation, counselling, treatment, follow-up and social reintegration of cured drug addicts, and
- capacity building through imparting drug abuse prevention and rehabilitation training to volunteers.”\textsuperscript{357}

The government has initiated treatment and rehabilitation of substance abusers through a scheme on a partnership basis with NGOs (Non-Governmental Organization).\textsuperscript{358} Under the scheme, major

\textsuperscript{354} Ibid.
\textsuperscript{355} Y. K. Sabharwal, “Narcotic Drugs and Psychotropic Substances” online: Supreme Court of India <http://www.supremecourtofindia.nic.in/new_links/NDPS.doc>.
\textsuperscript{358} Ibid.
portion of the cost of services is borne by the government and the voluntary organizations provide actual services through the Counselling and Awareness Centres and Treatment cum Rehabilitation Centres.

The ministry has also been implementing the projects through United Nations Office on Drugs and Crime (UNDOC) that include prevention of spread of HIV among vulnerable groups in South Asia, Empowering communities for Prevention of Drug and HIV/AIDS in India, Reducing substance use-related HIV vulnerability in female partners of male drug users and Prevention of transmission of HIV among drug users in SAARC countries.359

**Effectiveness of drug policy**

The effectiveness of the legislative measures adopted under the drug policy can be gauged from the observation of Chief Justice of India, Mr. Y. K. Sabharwal, in which it was expressed that, “The drug traffickers have been able to flourish despite stringent punishments provided under the *Narcotic Drugs & Psychotropic Substances Act*”.360 Furthermore, he expressed that stringent punishment provisions have not been able to provide real solution to the basic problem as the crime is on rise despite these measures.361

The punishment for many offences under the Act depend on the quantity of drug involved and there are three levels of punishment for small, more than small but less than commercial, and commercial quantities. Section 64A provides for immunity from prosecution to addicts who volunteer for treatment362, however one of the criticisms of this section is that the Act treats the drug user at par with the trafficker. The quantity fixed for a drug user is so small that it may not be suffice even for a single use which makes it next to impossible for addicts to seek medical help.

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360 *Supra* note 355.


or rehabilitation measures\textsuperscript{363} as the quantity they possess for consumption would probably be more than the minuscule small quantity fixed under the act. Owing to this fact drug users often fall in the category of traffickers and hence are unable to seek immunity and treatment under section 64A.

The Act has led to a significant increase in the arrests of low level drug users in contrast to the intended objective of the drug policy to provide treatment instead of punishing such users. In 2001, 17 percent of the individuals lodged in Tihar jail (central jail in New Delhi) were arrested under s. 27 of the Act dealing with the possession of small quantities of drugs for personal consumption.\textsuperscript{364} The provision of s. 64A dealing with treatment is rarely utilized. The classic illustration of the selectivity of justice coming into play in the present scenario is the conviction of those arrested under the NDPS Act and the people who are caught with small quantities of drugs in Bombay. Often it is the poor who are caught with small quantities or unsuspecting first time mules that are convicted and languish in jails because of lack of resources to seek legal help. Whereas big timers hire the best defence and manage to go scot free on technical grounds and advantaged by weak prosecution.\textsuperscript{365}

The situation further becomes grim for those charged under the NDPS Act as restrictions imposed on grant of bail under the NDPS Act amount to virtual denial of bail and ensure years of incarceration. Section 37 (1) provides a stringent rule for granting bail that requires that an accused person is not to be released on bail unless the court has reasonable ground to believe that the accused is not guilty and is not likely to commit an offence while on bail. The fundamental established rule of justice pertaining to the presumption of innocence until proven guilty has been reversed in the NDPS Act and the bail provisions are identical to the provisions of the now

\textsuperscript{363} Supra note 355.


\textsuperscript{365} Supra note 96.
repealed *Terrorist and Disruptive Activities (Prevention) Act* which resulted in long periods of imprisonment without trial and evoked sharp criticism from human rights groups.\(^{366}\)

Apart from the particular shortcomings of the provisions of the NDPS Act, successful prosecution under the Act has been adversely affected by factors such as improper investigation, lengthy trials, incompetent public prosecutors, witnesses turning hostile and overall time consuming criminal justice delivery system.

As has been previously discussed, organised crime groups survive and thrive on the lucrative drug trade. The situation is no different in Indian context. The involvement of organised crime groups in drug trade is obvious as it involves huge profits, requires organizational skills and resources to evade prosecution.

It has been observed in relation to the role of organised criminal groups and their involvement in the drug trade that, “Intervention programmes that employ purely punitive solution cannot by themselves be adequate because of the structure of judicial administration in India. There is no disincentive to commit crime here”.\(^{367}\)

The rate of acquittal has varied from 27.7% to 59.1% for the period of 1996-2006\(^{368}\) in NDPS cases which point to the direction of improper, ineffective investigation and weak prosecution. It would be right to infer that drug traffickers and the trade is flourishing inspite of stringent provisions of the NDPS act. The enforcement and legislative measures alone cannot provide a solution to the phenomenon of drug trade as the solution lies in addressing the problem and not the symptoms.


\(^{367}\) Supra note 96.

\(^{368}\) Supra note 355.
Solution

The interdependence of organised criminal groups and drugs trade can be exploited by targeting the drug trade as it is the prime source of revenues for organized criminal groups. It is arguable that the incorporation of a balanced approach in the drug policy consisting of prevention, treatment, harm reduction and enforcement measures along with overhauling of criminal justice delivery system can possibly ensure the containment of drugs trade and subsequently of organized crime.
CHAPTER 4

CONCLUSION

The phenomenon of organized crime in Canada and India is the outcome of factors that encompass 1) legislative inadequacies; 2) societal preferences and their impact on public policy and; 3) secondary factors. The fact is that more than often the legislature is expected to contain the phenomenon. The onus is always upon the legislature to churn out some magic remedy. In order to meet the expectations of people and also due to political considerations, the option of enacting more stringent legislation coupled with an emphasis on enforcement measures is considered most suitable. This politically viable approach yields little or no result in the intended direction. Rather, the stringent legislative and enforcement measures curtail the basic fundamental rights of citizens and augment the powers of state machinery which in turn negates the purpose of constitutional safeguards and makes citizens vulnerable to state excesses.

Ultimately, the approach leads to ineffective legislation and overemphasis on enforcement measures that coupled with societal preferences and other factors has no effect on the phenomenon of organized crime and instead is responsible for the same. The scenario with relation to this approach and other factors in the two countries can now be enumerated.

Canada

It has been more than a quarter of century since the cognizance of the problem of organized crime was first taken by the way of a series of federal/provincial conferences held back in 1965.\textsuperscript{369} Subsequently criminal organization legislation was enacted in 1997, however, it is quite evident from the unabated incidences and experiences that the phenomenon is well alive and kicking. Moreover, overemphasis on legislative and enforcement measures has been ineffective as a

\textsuperscript{369} Supra note 154.
solution for the problem of organized crime. The various factors that are responsible for the phenomenon of organized crime in Canada are summed up below in order to describe their collateral effect on the proliferation of organized crime scenario.

1. Legislative inadequacies

The primary reason for the phenomenon of organized crime has been legislative inadequacies that fail to give effect to legislative intent and ultimately make the legislative goals ineffective. The inadequacies of legislation enacted in the direction of containing organized crime can be summed up as below.

- **Criminal Code - ss. 467.1, 467.11, 467.12 and 467.13**

The criminal organization model and the associated offences as provided in the *Criminal Code* are of a complex nature that poses difficulty in the interpretation and subsequently in enforcement. While discussing the question of scope and application of ss. 467.11 and 467.12, dealing with offences of enhancers and soldiers respectively, it has been observed by the court that legislation is not vague as it relies on terms that are either defined or could be assumed to bear dictionary meanings and the legislation is not overly broad as it is directly connected to adopted policy of the parliament.\(^{370}\) However, there can be no denial in the fact that apart from difficult interpretation there are a lot of things to be proven for prosecuting an enhancer, soldier or leader. First of all the prosecution has to establish the requirements for a criminal organization including the fact that amongst the group’s main purpose is the facilitation or commission of an offence punishable with imprisonment for five years or more for material gain.\(^{371}\) This requirement is very generic and difficult to establish as the whole record of criminal activities of a criminal group has to be traced and examined in order to ascertain their involvement in the

\(^{370}\) *Supra* note 175.

\(^{371}\) *Supra* note 161.
serious offence. Moreover, the criminals often keep on changing their association and area of operations for evading prosecution, in such cases it becomes a remote possibility to identify criminal organization and persons associated with it. It is understandable that the intent behind these complex legislative measures has been to curtail the phenomenon that encompasses a complex structure and diverse network. However, implementation of these provisions becomes a tedious and time consuming affair for enforcement and prosecution agencies.

There has also been a constitutional challenge contending vagueness and over breadth of ss. 467.1 and 467.13, dealing with definition of criminal organization and leaders (instructors) respectively. The court observed that for prosecuting the guilty under the instructing offence, it has to be proved that in some way the organization itself including the person charged with instructing offence was directing the commission of offence. The member should be one of the three or more persons as the case may be who constitute the criminal organization, aware of the serious purpose or activity and in a position of authority to direct others. The satisfaction of all these requirements depends upon a number of extraneous factors and circumstances that are beyond the control of prosecution. The situation can be best explained through the statement of B.C. Solicitor General John van Dongen that was issued with regard to unabated gang violence in B.C. Mr. Dongen said that, “It is a complicated issue which ultimately generates an incredible amount of paperwork that is actually not helpful to police, not helpful to the Crown making their case” and that “It actually becomes a heyday for defence lawyers.”

Moreover, the incorporation of special provisions of wiretap authorizations and reverse onus on bail to supplement the criminal organization model have instead contributed to the concerns from a human rights perspective. The reverse onus on bail can amount to virtual denial of bail in

\[\text{\textsuperscript{372}}\text{ Supra note 186.}\]
\[\text{\textsuperscript{373}}\text{ “Vancouver now Canada’s gang capital, public safety minister says” Yahoo News (17 February 2009), online: Yahoo News <http://ca.news.yahoo.com/s/capress/090217/national/guns_and_gangs>.}\]
\[\text{\textsuperscript{374}}\text{ Supra note 167.}\]
case an innocent is charged with criminal organization offence. The notion is also against the spirit of Canadian Charter that emphasizes on presumption of innocence until proven guilty.

In all, it can be argued that the tedious prosecution of criminal organization offences owing to complex nature of model effects the conviction of intended elements and leads to ineffectiveness of the legislation.

- **Proceeds of Crime (Money Laundering) and Terrorist Financing Act, 2000**

The ineffectiveness of this Act can be illustrated from the fact that it has failed to protect the interest of third parties. The forfeiture of property provisions as provided in s. 8 (1) and forfeiture of vehicle provisions as provided in s. 11.2 (1) of the Act are criticized for having failed to protect the interests of innocent parties.\(^{375}\) Innocent parties can include joint tenants, business partners, lien holders and purchasers who are unaware of the fact that the property was used or derived from the instruments of unlawful activity. Furthermore, the provisions of the Act have often been confined to small fishes or low level criminals only, leaving the field open for big players.\(^{376}\) This selectivity in implementation results can result in losses of great magnitude to the state as the big players always have very high stakes that goes unreported due to this approach. This selectivity also negates the very purpose of the act i.e. to take out the profit motive from organized criminal activities by targeting the laundered proceeds of crime.

Moreover, the process of identifying and relating the property to criminal activity (for prosecution purposes) is time consuming.\(^ {377}\) This time lag can hamper the investigations as during the long course of investigations the suspects could become suspicious or aware of being monitored and could resort to destruction of evidence. Therefore, this time consuming process can translate into a weak prosecution case against the intended targets of this legislation.

\(^{375}\) Supra note 232.
\(^{376}\) Supra note 234.
\(^{377}\) Supra note 235.
The Act also lacks the vision and approach to evaluate the forfeiture strategy. This lack of vision is detrimental to incorporation of essential and vital changes needed for improvement of the forfeiture strategy. This approach could lead to ineffectiveness of the forfeiture strategy and ultimately of the legislation.

2. **Societal preferences and its impact on public policy and legislation**

In the case of organized crime, the root cause for its existence and proliferation is the demand for illicit products (primarily illicit drugs). It is pertinent to mention here that the consumers of such products are the members of society only and it is a social reality that there is a market for illegal products. It is arguable that such consumers remain totally indifferent of their role, a role that proliferates and increases the presence of criminal elements in their communities. As has been observed that, “organized crime is viewed as parasitical and alien to society, rather than as a natural outgrowth of society’s laws and institutions.”

Moreover, the society as a whole has to realize its role in the fight against organized crime as their choices and preferences ultimately reflect on public policy and legislation.

Often the legislature is criticized for lack of political will and not taking adequate measures in combating organized crime. However, a major fact is negated that it is the society only from which the legislature is elected and it is their own representation and not imposed upon them. If the majority of voters are responsible, then their representatives will reflect their values and vice versa. In this direction, the Psalmist's point is "not just that 'power tends to corrupt', though it does, but that the values which politicians find themselves driven to promote, and others find themselves driven to endorse, may be the product of degraded social circumstances and

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378 Supra note 236.
379 Thomas Gabor, *Everybody Does It!: Crime by the Public* (University of Toronto Press, 1994) at 162.
arrangements.” It is arguable that such is the scenario today that hampers the adoption of effective legislative measures against the phenomenon of organized crime.

3. Secondary factors

There are also a number of secondary factors that are responsible for the phenomenon of organized crime apart from the legislative inadequacies and societal preferences. Although these factors are not directly responsible for the phenomenon but they are indirectly contributing to the existence and proliferation of the same. These factors can be elaborated as below:

- Corruption

The prevalence of corrupt practices enables the organized criminal groups to evade prosecution and operate with impunity. The means of corruption have long been utilized by the phenomenon in Canada and the history can be dated back to 1955, when Flash, a tabloid scandal sheet, had blown the whistle on rampant corruption in Vancouver’s police department involving Detective Sergeant Len Cuthbert and his boss, Police Chief Walter Mulligan. Following the exposé, Sergeant Len Cuthbert unsuccessfully attempted to commit suicide and in the backdrop of these developments Attorney General Robert Bonner ordered Royal Commission of Inquiry, Tupper inquiry, which became the most sweeping probe of the Vancouver Police Department ever held. The Tupper inquiry found Police Chief Mulligan corrupt, a man who had bolted to the United States because he knew he could not clear his name, and stated that bookies paid bribes to

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382 Ibid at 12.
Sergeant Cuthbert and that these bribes were split with Police Chief Mulligan.\textsuperscript{383} Apart from the findings of inquiry, the conduct of those charged provides a clue to their alleged involvement in corrupt practices.

In 1950s, although the phenomenon of organized crime was in its infancy but its ability to evade prosecution through corruption is well documented in the memoirs of Angelo Branca, a criminal lawyer who went on to becoming a respected BC Appeal Court Judge. Mr. Branca wrote:

“Gambling and prostitution supplied the funds which made it possible to corrupt law enforcers. Betting was widespread. In 1951, after 565 convictions in six years against betting shops in Vancouver, the trade was flourishing as never before. If bribing policemen and city politicians did not keep them out of court, the bookmakers hired the best lawyers in town to keep them out of jail.”\textsuperscript{384}

The observation provides quite an insight as to how the means of corruption were employed by organized crime to exist and proliferate.

In context of Ontario, “high-profile government corruption cases overlaid with organized crime ‘threats’ and the creation of Ontario Police Commission in the early 1960s” started a debate over the independence of police.\textsuperscript{385} The discovery of police corruption in the anti-gambling squad of the Ontario Provincial Police (OPP) substantiated the threat perception of organized crime and led to the creation of Ontario Police Commission (OPC) for overseeing enforcement and the appointment of Justice Roach, in December 1961, as Royal Commissioner to examine the extent of organized crime in Ontario.\textsuperscript{386} Moreover, during that period scandals involving organized crime and government corruption led to the establishment of an administrative agency to fight these ‘threats’ and increase the efficiency of the police service in Ontario.\textsuperscript{387}

\textsuperscript{383} \textit{Ibid} at 129.
\textsuperscript{384} \textit{Ibid} at 18.
\textsuperscript{385} Margaret E. Beare and Tonita Murray, \textit{Police and Government Relations} (University of Toronto Press, 2007) at 334.
\textsuperscript{386} \textit{Supra} note 153.
\textsuperscript{387} \textit{Supra} note 385.
The situation becomes more clear through the findings of a survey conducted by Canadian Centre for Justice Studies, as per which police respondents reported that influence/corruption is one of the prevalent characteristic of criminal organizations in Canada with one half of the organized crime groups believed to exert influence/corruption in the areas of politics, the media, public administration and judicial authorities or the economy.\(^{388}\)

In the late 1990s, Special Task force was created in the background of widespread accusations of internal corruption on several fronts in Toronto police.\(^{389}\) And in 2004, upon the recommendation of the report of this Special Task Force, six Toronto drug squad officers were charged with assortment of criminal charges including corrupt practices in Canada’s biggest-ever case of police corruption.\(^{390}\)

Moreover, Canada has signed and ratified the United Nations Convention against Transnational Organized Crime (UNTOC) which recognized that, “corruption is an integral component of transnational organised crime and must be addressed as part of efforts to combat organised crime”.\(^{391}\) It is pertinent to mention here that “Canada acknowledges that no country is exempt from corruption, condemns it and ties it to international organised crime and terrorism.”\(^{392}\) From the above discussion it can be argued that existence of corruption and use of corruption by organized crime groups is responsible for aiding the phenomenon of organized crime in Canada.

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\(^{390}\) Ibid.

\(^{391}\) Supra note 144.

Lack of study of political corruption

Political corruption has the effect of causing dereliction of duties and obligations that are expected from the elected representatives. Established organized criminals possess the means and resources to influence the legislature through political corruption. The Canadian political scene seems comparatively tidy in terms of corruption scandals, however, in the light of the argument that the “study of political corruption has been woefully neglected”, it can be argued that this is partly because of lack of study of political corruption. It is pertinent to mention here that similar conclusion has been drawn by K.Z. Paltiel in his study of party finance as a central element of political corruption in the Canadian context.

Political corruption has the effect of influencing legislator/legislators to forego or oppose the adoption of effective legislative measures as well as to refrain from incorporating potentially potent/effective provisions in legislation. Political corruption can lead to the enactment of ineffective legislative provisions that could literally have no effect on the problem of organized crime.

The consequences of political corruption can be further studied from an observation made in respect of Royal Commission of Inquiry, Tupper inquiry, which was constituted to probe rampant corruption in Vancouver Police Department. It was observed that investigations prior to Tupper inquiry had “relieved former chiefs of their responsibilities or fulfilled a politician’s need for a scapegoat, but no body dug deep.” The observation was pointing to organized crime scenario in Vancouver of 1950s. According to Angelo Branca, a respected BC Appeal Court Judge, during that period “if bribing policemen and city politicians did not keep them out of court, the

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393 Supra note 129.
394 Ibid at 2.
395 Supra note 381 at 13.
bookmakers hired the best lawyers in town to keep them out of jail.”

The Tupper inquiry found the Police Chief Mulligan corrupt and stated that bookies paid bribes to Sergeant Cuthbert and that these bribes were split with Mulligan. But in spite of the findings, charges were not pressed in the court of law by office of Attorney General by stating that they have insufficient evidence to support Tupper’s findings of corruption. The situation in the present case can be best described in the words of Canadian political historian Jack Granatstein of the University of Toronto, who opines that a commission of inquiry is introduced “to shelve a problem” not to solve it. It can be reasonably deducted from the opinion of Mr. Granatstein that the real motive behind commissioning of an inquiry by government is postponement of an issue rather than seeking effective solution to the same.

Furthermore, in relation to political corruption it has been said that corruption “measures the failure to reach the norms expected of healthy politics” and it has been argued that “judged by the norms of the Rule of Law, the Canadian polity is sick indeed.” In the light of the abovementioned incidents of corruption, it can be argued that there must have been some reasonable grounds that enabled the author to make such an observation.

The case of lack of study of political corruption in Canada has also been argued by Professor Bohdan Harasymiw, University of Calgary. According to Professor Harasymiw, in Canada “the literature on the subject never connects organized crime with politics or vice versa” and that “the research has yet to be done.” It has been argued that one of the measures that can be effective in controlling the organized crime is “wide public expectations of probity in politicians—which requires an acknowledgement that the seeds of corruption and organized crime are not situated

396 Supra note 381 at 18.
397 Supra note 381 at 129.
398 Supra note 381 at 136.
399 Supra note 381 at 139.
400 Supra note 380.
‘outside’ but inside the house of democracy.”\textsuperscript{402} The measure clearly suggests the need to recognize and acknowledge the probable factor of political corruption behind the phenomenon of organized crime. From the above discussion, it can be argued with some probability that the lack of study of political corruption in Canadian context can understandably lead to ignorance of this vital aspect of corruption that has the potential of aiding the phenomenon of organized crime.

In this direction another angle that needs to be probed is the cost associated with contesting elections. It has been argued that right from the first elections in Canada, wealth and access to resources have figured prominently in the ability to effectively contest elections.\textsuperscript{403} Throughout the business interests have remained crucial to financing of political campaigns, resulting in intimate relationship between economic and political elites; a relationship that almost “guarantees that corruption in some form would become a constant characteristic of the Canadian political process.”\textsuperscript{404} Furthermore, the examples of corruption within the Canadian political system is a point in the direction that include abuses by provincial governments in the Maritimes, systematic corruption in Quebec during Duplessis regime and systematic corruption at federal levels of government under Prime Minister Mulroney.\textsuperscript{405} In the light of said instances of political corruption and considering the need of finance for political campaigning, it can be argued that susceptibility of political system to corruption and lack of study of political corruption can enable the organized criminals to use their financial power to corrupt the political system in Canada.

\textbf{- Overemphasis on enforcement measures}

As has been discussed earlier in Chapter 3, the phenomenon of organized crime is dependant largely upon illicit drugs trade for generating revenues. This interdependence can be exploited by targeting the drugs trade upon which the larger phenomenon of organized crime is largely

\textsuperscript{402} Ibid at 16.
\textsuperscript{403} Jeffery Ian Ross, \textit{Varieties of state crime and its control} (Criminal Justice Press, 2000) at 61.
\textsuperscript{404} Ibid.
\textsuperscript{405} Ibid.
dependant. The demand for illicit drugs can be curtailed through emphasis on prevention and demand reduction measures. However, subsequent drug policies have placed undue emphasis on prevention measures inspite of their repeated failures. This overemphasis is enabling the phenomenon of organized crime to continue profiting from its involvement in drugs trade and proliferate further.

After having concluded with the factors that are responsible for organized crime in Canada, this chapter will now conclude with the factors responsible in Indian context.
India

The factors responsible for the phenomenon of organised crime in India include 1) legislative inadequacies; 2) societal preferences and; 3) secondary factors. Although adequate cognizance of the phenomenon has not been taken considering its threat perception, still, the measures that have been adopted to combat the phenomenon overemphasize legislative and enforcement measures. This overemphasis has been ineffective as a solution for the problem of organized crime. The various other factors responsible for the phenomenon can be summed up as below:

1. Legislative inadequacies

- Maharashtra Control of Organized Crime Act, 1999

The complex nature of model along with draconian provisions of this Act provides sweeping powers to enforcement agencies. And in India the enforcement agencies are known, from past experiences, for abuse of provisions and gross human rights violation against minorities and political opponents rather than prosecuting the intended targets.

One of the most draconian provisions of the Act is the confession rule which provides for admissibility of confession recorded before a Superintendent of Police.406 This provision provides absolute legitimacy to illegal ways employed by police authorities to extract confessions. The provisions of the MCOCA are also used to arrest persons rather arbitrarily407 and illegally.408 Furthermore, innocent persons so charged under the Act are left with no other option than to languish in jails because of stringent reverse onus on bail provisions.

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406 Supra note 306.
407 Supra note 319.
408 Supra note 320.
However, the main issue involved with this legislation is more than just its stringent provisions. The primary concern is the proper implementation of provisions owing to the state of affairs of enforcement agencies, judiciary and the executive. The legislation automatically becomes ineffective when it is not properly implemented as the provisions are used for implicating minorities, political and other opponents rather than prosecuting the intended targets i.e. organised crime syndicates. It will not make any difference even if all the shortcomings of the act are removed, until and unless the state of affairs of enforcement agencies, judiciary and executive is not improved.

- **Prevention of Money Laundering Act, 2002**

This legislation is not comprehensive and particularly excludes the offences and potent provisions of relevant Acts in its schedule of offences. It is worth noting that the most hard hitting provision of the *Prevention of Corruption Act, 1988*, dealing with possession by a public servant of assets disproportionate to his income, has been not been included in the schedule of offence.\(^{409}\) Moreover, the Act incorporates only those provisions that have miniscule effect on the real issue of money laundering. And if that was not enough, uncalled for conditions have been attached to the existing provisions that make them ineffectual.\(^{410}\) The legislation is just paying lip service to the requirements of UN General Assembly that demands its member states to enact national money laundering legislation.

2. **Societal preferences and its impact on public policy and legislation**

The demand and consumption of illicit products takes place in the same society wherein violent crimes are committed by organised crime groups and it is ironical that the society blames the

\(^{409}\) *Supra* note 292.

\(^{410}\) *Supra* note 293.
legislature and governance instead (for not being able to provide crime free societies) by acting hypocritically and indifferently towards its own creation.

Moreover in the Indian context, it has been argued that the origin of political corruption starts from the huge expenditure incurred during election to public offices.\textsuperscript{411} The major factors that are responsible for the soaring election expenditures include the need to impress the public and make their (political parties’) presence felt in the vast territorial extent of electoral constituencies, and offering all sorts of inducements to voters through spending enormous amount of money.\textsuperscript{412} It is pertinent to mention here that it is the expectations of masses only that are being met by political parties at the time of elections which is a contributing factor to the rising election expenditures. Accordingly, the expenditure incurred on meeting voter’s expectations to be treated throughout the campaigning period is seen as an investment by political parties which they tend to recover through all means necessary after their election to the seat of government. In order to meet campaigning expenses political parties collect money by means, fair or foul, and spend lavishly without any accountability.\textsuperscript{413} In a biographical study, former Prime Minister of India, Mr. H. D. Deve Gowda while expressing his views on the question of scrutiny of sources of political funding, pointed that:

“Where most of the money received by political parties and candidates is black, how can sources be revealed? If any attempt to do so is made, the sources will dry up instantaneously. Also, when a great deal of election expenditure has got to be on clandestine and socially unacceptable activities, how can the accounts be kept or opened for any scrutiny?”\textsuperscript{414}

The consequence of the societal preference to be offered inducement during elections has been that the political parties became dependant upon shady sources for funding which coupled with

\textsuperscript{414} Attar Chand, \textit{Prime Minister H. D. Deve Gowda: the gain and the pain} (Gyan Book, 1997) at 167.
subsequent criminalization of politics increased the influence of organised criminal gangs over the legislature to an extent that at present out of a total of 543 Members of Parliament, an astonishing 128 (approximately 24%) of MPs have cases pending against them in various courts of India, including 24 charges of murder or attempted murder. Considering the present scenario, one can well imagine the public policy and state of affairs of the legislature that is responsible for enactment of legislative measures to combat phenomenon of organized crime. In all, it can be argued that the present scenario is the outcome of societal preferences that is being reflected back in the form of corrupted political system and unabated organized criminal activities.

3. Secondary factors

There are also some secondary factors that apart from legislative inadequacies and societal preferences are responsible for the phenomenon of organized crime in India. These factors contribute by creating conducive environment for organized criminals to operate and proliferate further. These factors can be summed up as below:

- Criminalization of politics and lack of political will

It can be argued that criminalization of politics is one of the foremost factors that are behind the lack of political will to contain the phenomenon of organised crime in India. The Indian political scene presents a scenario wherein tainted ministers have become a norm irrespective of the party lines. In India, many criminals enter politics with the motive of gaining influence and to ensure that charges against them will be dropped and also because of their financial clout, they are able to make it big in the political arena. Moreover, political parties themselves tap criminals for

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procuring funds and in return promise them patronage and protection.\textsuperscript{417} The relationship so formed is convenient and mutually beneficial. As a result, the legislature sidelined the public interest in spite of the cognizance and urgency to adopt effective legislative measures against the menace of organized crime.

Gradually organized criminals, apart from exerting influence upon the legislature, started sponsoring their own preferred candidates and ultimately over a period of time they were successful in securing sanctity for themselves as elected representatives. The dimensions of criminalization of political life in India have been described by a former top civil servant, ex-cabinet secretary B. G. Deshmukh, in searing terms:

\textit{“Since independence,…politicians started finding that anti-social elements were…quite useful for getting funds for fighting elections. These elements also [discovered] the attraction and convenience of holding political positions which not only gave them social status but also a certain immunity…. When this situation became all-pervasive, anti-social elements thought that instead of merely fighting somebody’s battle, they could themselves enter the fray. They had the inherent advantage of money power and muscle power. Since most of the political parties were interested only in winning elections, they did not mind giving tickets [party nominations] to such candidates howsoever undesirable they may be. This was the beginning of the end.”}\textsuperscript{418}

The vicious circle ended with the perpetrators becoming law makers themselves, whose past never alienated their present. Hence, in the Indian context, the criminalization of politics and subsequent lack of political will can be said to be one of the most important constraints towards adoption of effective legislative measures against the phenomenon of organised crime.

The state of affairs and integrity of elected representatives in India can be further gauged from the example of a notorious mafia don who kept on winning elections to the state legislature through muscle power for about 20 years while still on trail in court for 20 serious crimes like murder, attempt to murder, extortion etc and who openly abused his position to threaten, coerce and

\begin{flushright} \textsuperscript{417} \textit{Ibid.} \\
\textsuperscript{418} Shashi Tharoor, \textit{India: From Midnight to the Millennium and Beyond} (Arcade Publishing, 2006) at 265 and 266. \end{flushright}
otherwise gain over the prosecution witnesses so that he could not be convicted in any of the cases.\textsuperscript{419} Moreover, recent instance of an MP having direct involvement in a human smuggling case\textsuperscript{420} and the fact that approximately 24\% of Indian MPs have cases pending against them in various courts of India, including 24 charges of murder or attempted murder is a point in the direction of criminalization of politics in India.\textsuperscript{421} In the light of the present political scenario, the lack of political will to combat the phenomenon of organized crime is obvious with the legislators of shady past at the helm of affairs.

- **Lack of research initiative in the area**

It is pertinent to mention here that cognizance of the phenomenon of organized crime has not been taken inspite of the fact that organised crime is spreading its tentacles even further throughout the country. At present, only four states out of total of twenty eight states/provinces have taken the cognizance of phenomenon and enacted the organised crime legislation. There has not been any central/federal legislation dealing directly with the organised crime.

- **Abuse of provisions**

The enforcement agencies in India are known for excesses and abusing legislative provisions due to which various past legislation have been scrapped after reported human rights violations. The most glaring example in this direction is of now repealed *Terrorist And Disruptive Activities Act* which was used to implicit minorities, political and other opponents.\textsuperscript{422} The police authorities in particular abuse the provisions with impunity inspite of reported cases of custodial deaths, illegal detention and arrests, false implications, and other police excesses.\textsuperscript{423} Abuse of provisions has proved to be a detrimental factor towards enactment of stringent and effective legislative

\textsuperscript{419} Shashi B. Sahai, *Politics of Corruption: the goddess that failed* (Gyan Books, 1995) at 41.
\textsuperscript{420} Supra note 139.
\textsuperscript{421} Supra note 415.
\textsuperscript{422} Supra note 141.
\textsuperscript{423} Supra note 149.
measures. Hence, even any genuine attempt to enact an effective piece of legislation encounters stiff opposition which indirectly goes on to benefit organized criminals.

- **Corruption**

Corruption has crept into all the organs of the state, government departments and state agencies from top most level of hierarchy to lower most authority. As has been discussed earlier, corruption is primarily used by organized criminals to evade prosecution and forms an integral component of organized criminal activity.

Moreover, the Indian scenario is particularly conducive in this context as corrupt practices are rampant in the justice delivery system through which practical implementation of any legislation is supposed to take place. The gravity of the situation can be best illustrated through the example of a sting operation that was carried out in 2004 to expose judicial corruption. Under the exposé a magistrate was bribed $883 and in return, arrest warrants were got issued against the President of India, two judges of Supreme Court of India (including the Chief Justice) and President of Bar Association of India. More recently names of 34 judges, including one from the Supreme Court of India (apex court of the land), seven from High Courts and others from subordinate judiciary have cropped up in the Uttar Pradesh provident fund scam. In the light of the given instance of judicial corruption one can easily imagine the state of affairs of police authorities, state and central investigation agencies and prosecutors. It has been rightly observed that “there is endemic corruption in India, particularly at the political and official levels.” Hence, it would be right to suggest that existence of corruption is indirectly responsible for the existence and proliferation of organised crime in India.

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- **Overemphasis on enforcement measures**

As has been discussed earlier in Chapter 3, the phenomenon of organized crime is heavily dependant upon the illicit drugs trade. This interdependence can be exploited by targeting illicit drugs trade through the adoption of preventive and demand reduction measures. The targeting of illicit drugs trade will automatically affect the larger phenomenon of organized crime. However, there has been undue overemphasis on legislative and enforcement measures under the present drug policy in spite of the repeated failure of the approach. This overemphasis is enabling the phenomenon of organized crime to continue profiting from its involvement in illicit drugs trade and proliferate further.
CHAPTER 5

RECOMMENDATIONS

Canada

The recommendations for combating the phenomenon of organized crime in Canada can be elaborated as below:

1. Amendment of legislation

   - *Criminal Code* - ss. 467.1, 467.11, 467.12 and 467.13

The criminal organization model and the associated offences as provided in the *Criminal Code* are of a complex nature that poses difficulty for interpretation and subsequently enforcement. There are a lot of things to be proven for prosecuting an enhancer, soldier or leader of a criminal organization. First, the prosecution has to establish the requirements for a criminal organization including the fact that among group’s main purpose was the facilitation or commission of an offence punishable with imprisonment for five years or more for material gain.\(^\text{427}\) This very generic and difficult to establish requirement should be amended to be more specific in order to enable easy interpretation. As has been stated on behalf of Solicitor General of B. C., “cutting paperwork for police and Crown prosecutors tops his wish list”, furthermore, Solicitor General observed that “It is a complicated issue which ultimately generates an incredible amount of paperwork that is actually not helpful to police, not helpful to the Crown making their case” and that “It actually becomes a heyday for defence lawyers.”\(^\text{428}\) These observations were made by Solicitor General of B. C. with regard to prosecution of organized criminals in the light of unabated gang activity in B. C.

\(^{427}\) *Supra* note 161.
\(^{428}\) *Supra* note 373.
There has been a constitutional challenge contending vagueness and over breadth of ss. 467.1 and 467.13 dealing with definition of criminal organization and leaders (instructors) respectively. For prosecuting the guilty under instructing offence, it had to be proved that in some way the organization itself including the person charged with instructing offence was directing the commission of offence.\textsuperscript{429} The member should be one of the three or more persons as the case may be who constitute the criminal organization, aware of the serious purpose or activity and in a position of authority wherein he can direct others. The satisfaction of all these requirements depends upon a number of extraneous factors and circumstances that are beyond the control of prosecution which can ultimately translates into lower rates of conviction of the intended targets. This provision pertaining to the instruction offence (s. 467.13) should be amended, in the light of ground realities, to be more practical and enforceable.

The incorporation of special provisions of wiretap authorizations and reverse onus on bail\textsuperscript{430} should also be amended in order to prevent possible police excesses and unnecessary incarceration of innocents.

\textbf{Proceeds of Crime (Money Laundering) and Terrorist Financing Act, 2000}

There should be amendment to the present ss. 8 (1) and 11.2 (1) dealing with forfeiture of property and forfeiture of vehicles respectively. The amendments are necessary to ensure adequate protection of the interests of third parties that can include joint tenants, business partners, lien holders and purchasers.\textsuperscript{431} Moreover, there should be effective implementation in order to ensure that the provisions are not only confined to “small fishes” or low level criminals.\textsuperscript{432} Another prosecution issue that needs to be resolved is the time consuming process of

\begin{flushleft}
\textsuperscript{429} \textit{Supra} note 186. \textsuperscript{430} \textit{Supra} note 167. \textsuperscript{431} \textit{Supra} note 232. \textsuperscript{432} \textit{Ibid.}
\end{flushleft}
identifying and relating the property to criminal activity.\textsuperscript{433} This time consuming process further translates into low rates of prosecution and ineffectiveness of legislative measures.

2. **Emphasis on prevention measures**

The emphasis of organized crime policy and drug policy (as organized crime is dependant on illicit drugs trade for survival) should be on prevention measures as opposed to overemphasis on legislative and enforcement measures.\textsuperscript{434} The interdependence of drug trade and organized crime should be exploited by focusing on demand reduction and harm reduction measures. The approach is worth trying as the past experiences have shown that overemphasis on enforcement measures has been totally ineffective in containing the interdependent phenomenon of organized crime and drugs trade.

3. **Creating public awareness to obligate public policy**

There is an urgent need to create awareness amongst the masses about their role in combating organized crime. It is not only that the masses are the ultimate sufferers of the menace but they should appreciate their own contributions towards the proliferation of organized crime, in most accounts the ultimate consumers of illicit products are amongst the masses. Organized criminals cannot sustain their operations in the absence of a demand for their products, particularly illicit drugs which forms the backbone of organized crime.

The highlighting feature of awareness programs should be to make people accountable for their choices and their consequences. The enlightened masses will have a positive effect on the formation of public policy and legislation that would be practically viable for combating the phenomenon of organized crime.

\textsuperscript{433} *Ibid.*
\textsuperscript{434} *Supra* note 335.
India

The reality of organised crime in India is the outcome of multiplicity of factors and it is impossible to fix responsibility upon a single factor. Above all whole of the criminal justice delivery system and executive needs through review and radical changes in the first place. An effective solution to the problem will require a holistic approach as the success of each measure is dependant and is in direct relation to the success of all the other measures.

1. Amendment of legislation

- Maharashtra Control of Organized Crime Act, 1999

The draconian provisions pertaining to admissibility of confessions before a police officer under s. 18 (1), increased duration of police custody of an accused, increased duration to file final investigation report and stringent bail conditions should be amended to restore the earlier procedural law provisions. The state of affairs of criminal justice system and enforcement agencies, and past experiences have shown abuses of such provisions and gross human rights violations against minorities, political and other opponents. The sweeping powers entrusted to enforcement agencies in the act should be curtailed and instead emphasis should be laid on the proper implementation of basic provisions.

- Prevention of Money Laundering Act, 2002

In order to effectively target the menace of money laundering, this Act should include section 13 (1) (e) of Prevention of Corruption Act, 1988 dealing with the issue of possession, by a public servant, of assets or resources disproportionate to his known sources of income in the schedule of offences.\textsuperscript{435} Moreover, the act should done away with the conditions attached to offences relating to the Prevention of Corruption Act, 1988 that are included in the schedule as these conditions are

\textsuperscript{435} Supra note 292.
impractical and make the application of provisions ineffectual. The offences in respect of which the condition of minimum value has been laid usually do not involve such a large amount.\textsuperscript{436} The Act should also incorporate the offences provided under the \textit{Income Tax Act, 1961} in the schedule of offences as tax evasion and subsequent money laundering activities are interrelated.\textsuperscript{437}

2. \textbf{Emphasis on prevention measures}

The emphasis of organized crime policy and drug policy (as organised crime is dependant upon illicit drugs trade for their survival) should be on prevention measures as opposed to overemphasis on legislative and enforcement measures that have proved to be ineffective. The emphasis on prevention and demand reduction measures will have the effect of reduction in demand for illicit drugs and other illegal products. As a result the supply will be automatically reduced owing to lack of demand.

3. \textbf{Creating public awareness to obligate public policy}

There is an urgent need to create awareness amongst the masses about their role in combating organized crime. The masses should realize their collective responsibility in the proliferation of the phenomenon of organized crime, as the consumers of illicit products are amongst the masses only. As discussed above, the enlightened masses will also have a positive effect on formation of public policy and legislation apart from abstaining from consumption of illicit products.

4. \textbf{Overhauling of criminal justice delivery system}

The total criminal justice delivery system of India needs to be reformed in order to effectively secure convictions under the organized crime legislation. It has been observed by the Chief Justice of India that:

\textsuperscript{436} \textit{Supra} note 294.
\textsuperscript{437} \textit{Supra} note 298.
“witnesses turning hostile was nothing new. This problem could be overcome only by completing the trial within a specific period” and that, “it is the investigation that is to be made stronger as courts can decide only on the basis of evidence on record”

Today the real issue before the judiciary is the ever increasing delay in disposing of pending cases that is in part caused by shortage of judges. The agonizing long trials have their bearing on prosecution cases as evidence becomes hard to come by over the period of time. The prosecution evidence and particularly the oral evidence become unavailable due to numerous factors including hostility, death or infirmity of the witnesses.

Moreover, the recommendations of 2003 report of the Committee on Reforms of the Criminal Justice System (Malimath Committee) pertaining to increasing the number of judicial officers, prompt filling of existing vacancies to prevent the case backlog from further increasing, and constitution of National Judicial Commission to fix judicial accountability should be implemented at the earliest. The acute shortage of judges particularly at lower most level of judiciary i.e. District Courts should be done away with annual recruitment drives. Moreover, the recruitment process relating to the appointment of judges at appellate courts and at apex court needs to be modified in order to streamline the procedure.

At present, the judges are initially appointed as magistrates at District Courts from where they are elevated to High Courts (at state/province level) and ultimately to the Supreme Court of India (apex court of the land). The procedure for the appointment of judges at the higher levels of the judiciary, i.e. at the High Courts and the Supreme Court, should not rest completely on the approval of collegium of Supreme Court. This system has given rise to nepotism, favoritism and political interference in the appointment process.

Since 1993, the role of the executive in the appointment of judges at the higher levels of the judiciary has been reduced to being inconsequential. The judiciary (collegium of Supreme Court) has assumed a paramount role and recommends the names of judges that are to be elevated to higher judiciary.

Under this system, a majority of the judges appointed to High Courts are elevated from the bar only. Moreover, the newly elevated judges from the bar are posted at the very same High Courts where they had been practicing as advocates. This practice has resulted in judicial nepotism and has raised questions about the integrity and credibility of the bench. Interestingly, the collegium of Supreme Court also decides as to who will be their brother judges in the Supreme Court. The collegium recommends the proposed elevations to the Supreme Court of India from amongst the judges of the High Courts.

There can be expeditious, credible and fair appointments to the higher judiciary by doing away with this system of seeking recommendation from collegium of Supreme Court. Furthermore, expeditious appointments will reduce the shortage of judges and will ensure speedy trial and convictions of criminals who are often exonerated in lengthy trials due to lack of evidence.

**5. Commencement of witness protection programme**

The hostility of witnesses due to the fear of influence, intimidation or repercussions is the major reason for the failure of prosecution cases against organized criminals.\(^{440}\) At present there is no system in place to protect the witnesses apart from the conventional way of providing police security. The inefficient police protection and on the contrary, professionalism of the organized criminals acts as a grave intimidation to witnesses. The Supreme Court of India has also dealt exhaustively with the subject of “Witness Anonymity” and “Witness Protection Programmes”

and has stated that the Parliament must consider making a law on the subject at the earliest opportunity.\footnote{Taylor & Francis, \textit{Commonwealth Law Bulletin, Volume 30} (Commonwealth Secretariat, 2004) at 263.} Furthermore, the Supreme Court has also noticed that, “apart from cases of trials of terrorists and those involved in organized crime”, these measures are necessary even in the case of other serious offences wherever there is evidence of grave danger to the life and property of the witness or his/her relatives.\footnote{Ibid.} It is necessary to constitute a separate independent agency for protecting threatened witnesses. Moreover, as a matter of policy the identity of witnesses in high profile cases should not be disclosed in any document that is accessible to public. In the event of unlawful disclosure, the accountability should be fixed on police officials, especially the investigating officer, his team, and on the staff of the court. These measures would ensure the safety of witnesses and encourage them to depose without fear of intimidation which would have a positive effect on the prosecution of organised criminals.

\section*{6. Revising and improving enforcement agencies’ training manuals}

The enforcement agencies are inadequately prepared and trained to detect, investigate, handle and present a case for successful prosecution of complex and sophisticated criminal activities of organized criminals.

The training of the lower hierarchy (that is primarily responsible for conducting preliminary investigations and is vital for successful prosecution) is altogether neglected. “An average investigating officer does not know the importance of all the traces left at the scene of crime, nor does he know the proper sampling techniques. He may, thus, fail to preserve important items of evidence or specimens.”\footnote{James Vadackumchery, \textit{Indian police and miscarriage of justice} (APH Publishing, 1997) at 54.} Many of the constables do not attend any in-service courses and likewise the police officers do not attend any specialized training programmes after the induction
course. This lack of training and expertise of investigating officers at lower hierarchical levels is proving to be detrimental to the successful prosecution of organised criminals and needs to be resolved.

Moreover, the advent of information technology, advanced telecommunication methods and subsequent non physical nature of evidence has left the prosecuting agencies (especially police authorities) handicapped in their approach. There is an urgent need to revise and improve the existing training manuals in order to ensure that prosecuting agencies stay a step ahead of organised criminals in their grasp of current advancements.

7. **Revising the pay scale of police personnel**

One of the major causes of corruption amongst the police personnel is the inadequate remuneration. The corruption enables the organized criminals to evade prosecution, destroy evidence and weaken the prosecution case, which ultimately has the effect of nullifying the legislative measures enacted to contain the phenomenon. The pay scales of police personnel need to be revised immediately as they have remained nearly stagnant and have ignored the vital factors such as rising cost of living index and inflation.

Furthermore, the working conditions of police personnel need to be improved in order to make them efficient in proper implementation of provisions of organised crime legislation. The police personnel have poor social status and majority of police officers have to live either in slum-like conditions or away from their families for most of their careers. The combined effect of these factors on the police personnel can be witnessed in the form of behavioral irregularities, inefficiency and tendency to involve in substance abuse apart from resorting to corrupt practices.

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445 Supra note 443.
446 Supra note 149 at 139.
447 Ibid.
The pay scales of police personnel should be revised immediately and the working conditions should be improved so that they can work efficiently and effectively towards the vital task of enforcing the legislation.

The collateral effect of these recommendations can have the effect of controlling the phenomenon of organized crime in Canada and India.
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