

“POWER TO PREVENT”: SURVEILLANCE, DEMOCRACY AND LOOK-OUT CIRCULAR (LOC) IN INDIA

P. Arun¹

Abstract

During exceptional situations, in order to trace, prevent, and monitor a person who is evading arrest or under suspicion, and is required by law enforcement authorities, the competent authorities can issue Look Out Circulars (LOCs). It is issued to fulfill the stages of both investigation as well as trial. The power to prevent the right to travel and movement is quite extraordinary in its nature and it violates the fundamental right of an individual. Such drastic/extraordinary powers are exercised when exceptional situations arise such as in matters of national security, fulfillment of investigations or trial and others. Despite a series of instructions and guidelines issued by Ministry of Home Affairs, there have been incidents of sheer violation of such power. It has been misinterpreted and misused, and also issued by the central government to suppress dissent. Moreover, the developments in digital technologies unfolded new techniques and practices of surveillance which posit dangers to the right to travel. This article will focus on the powers, guidelines and operational functioning of look out circulars. Further it will try to understand the monopolization of means of movement by the state by incorporating new techniques and practices in surveillance, and its impact on democratic rights and liberties.

Key words: Democracy, Travel, Look Out Circular, Surveillance, State and.

Introduction

The development of modern nation-states consequently led to the development of territoriality and bureaucratic administrative system where every citizen is distinguished with their political document i.e., ‘passport’. In modern state system, passport plays a crucial role to identify, trace, surveil and prevent individuals’ to travel between the states, which according to John Torpey is ‘monopolization of the legitimate means of movement.’² Under these developments the modern democracies held the right to travel and movement as a fundamental right though not absolute in

¹ P. Arun is an independent researcher with interests in state, surveillance and democracy. He has completed his post-graduation in Political Science from the University of Delhi. He has presented papers on a wide range of themes in numerous national and international seminars. Email : arun.solarise@gmail.com

² Torpey J, *The Invention Of The Passport* (Cambridge University Press 2000)

nature. In India, for exceptional cases look out circulars are issued to prevent individuals travelling abroad. Using the scholarship of surveillance studies this article will try to understand about state, democracy and look out circulars. This article will begin with identifying the meaning of LOC from several important cases. The following section would deal with the procedures, powers, validity, competent authority, and guidelines under LOC. The administrative infrastructure in India drastically proliferated with the use of surveillance technologies which made the state pervasive and omnipresent. The final section would analyze the *Priya Parameshwaran Pillai v Union of India and Others* (2015) which reflects the existence of deep Indian state and political surveillance.

Look-out circular (LOC) in India

LOCs are primarily issued to trace, prevent, and monitor effectively the airport entry or exit of persons who are either wanted or under suspicion and is required by law enforcement authorities³. The Delhi High court judgement in the case of *Vikram Sharma & Others v Union of India* (2010) and *Sumer Singh Salkan v Assistant Director & Others* (2010) clearly held that there is no legal definition of an LOC. However, it is comprehended as an executive instruction or communication circular from an authorized government agency with reference to a person, who is wanted by that agency for fulfillment of a legal requirement. It does raise the question how an instruction or communication circular without any statutory backing can be used to fulfill a legal requirement.

There might be circumstances where the state takes the recourse of this extraordinary power, with the help of digital technologies and sorting techniques to surveil, trace, identify and prevent individuals those who are evading. It became possible when the passport turned out as an indispensable document to control movements. This is because individuals are not merely crossing borders physically, but also travelling with data about them.⁴ Here, the states' extraordinary power to control movements is carried out by manipulating and sorting individuals with the help of their data, and such data is utilized in LOC.

³CBI (Crime) Manual-2005' (Central Bureau of Investigation, 2005) <<http://cbi.nic.in/aboutus/manuals/CrimeManual.pdf>> accessed 2 May 2016

⁴Lyon D, Surveillance Studies (Polity 2007) 72

The 26/11 Mumbai terror attack exposed several weaknesses in India's intelligence gathering and action networks, therefore National Intelligence Grid (NATGRID) was launched.⁵ It is a technical interface or central facilitation center, with an integrated facility, which aims to link databases of 21 categories, and also includes passport data, air reservations and immigration data. In addition to this, it would be shared with 11 central agencies (eg. CBI, IB, R&AW, NIA etc.). It is essentially 'dataveillance' as it uses personal data systems in the investigation and monitoring of the actions or movements.⁶ It gives immense power to the state to surveil and monopolize the means of movement.

If we look into its past accounts of LOC, we could see that it was rigorously used and misused. Several writ petitions were filed in the courts to revoke infructuous and unlawful issuance of this circular, which subsequently prevented individual right to travel. Right to travel abroad is a fundamental right guaranteed under Article 21 of the Constitution of India, which was agreed in the judgements of Supreme Court in *Satwant Singh Sawhney v D. Ramarathnam* (1967), and the same was reiterated in *Menaka Gandhi v Union of India* (1978). It is also guaranteed under the Universal Declaration of Human Rights (1948), Article 13 which says that (1) everyone has the right to freedom of movement and residence within the borders of each state and (2) everyone has the right to leave any country, including his own, and to return to his country.⁷

The court defended the issuance of LOC in several cases, due to the circumstances where the state had to take the route of such a coercive power. In *N. Saravanapavan v The Chief Immigration Officer* (2012) writ petition by a foreigner was dismissed and it was held that he was subjected to questioning by the authorities due to LOC. It was further elaborated in *E.V. Perumal Samy Reddy & Others v State Represented by the Deputy Commissioner of Police* (2013) when the court observed that, "Need may arise to apprehend persons, who have ability to fly, flee away the country. So, L.O.C. orders are issued. It is a harmonious way out between a person's fundamental right and interest of the society/state. But, in any case, it must be fair and reasonable. It should not be indiscriminate without any reason or basis." There have been several cases where LOC was used unfairly and unreasonably which consequently impinged the individual's right to travel abroad. In *Chandran Ratnaswami v K.C.*

⁵NATRID will automate the existing manual processes for collation of Intelligence. It shall leverage information technology to access, collate, analyze, correlate, predict and provide speedy dissemination. "Status of NATGRID" (Kiren Rijiju) Rajya Sabha Debates (16 April 2014)

⁶ Lyon D, Identifying Citizens (Polity 2009) 50

⁷Universal Declaration Of Human Rights' (United Nations 1948), available at <http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf>

Palanisamy & Others (2013) the court even saw the ways in which the power of LOC was “manipulated and misused [under] the process of Court so as to deprive the appellants from their basic right to move free anywhere inside or outside the country”. Similarly, in *Avinash Antony v The Sub Inspector of Police* (2013) the court observed that LOC ceased to have any effect once its purpose was served and it was no longer necessary to be kept in force, but practically it does not happen and people under LOC reach out court to get its closure. It was also used against matrimonial disputes, however in 2010 such dispute chalked out guidelines for LOC in Vikram Sharma’s case and Sumer Singh Salkan’s case.

In the aforementioned cases we could understand that the powers under LOC is basically quite drastic in its nature. The next section would elaborate the executive powers, competent authorities, validity and guidelines for LOC.

LOC: An Extraordinary Power to Prevent

The power to issue LOCs is carried out in accordance with the Ministry of Home Affairs, Office Memorandum (O.M) which originated on 5 September 1979, then it was refined on 27 December 2000. As an aftermath of Vikram Sharma’s case and Sumer Singh Salkan’s case, fresh directions and instructions were issued by MHA in 2010. According to MHA guidelines the circular dated 2000, it was mentioned that LOCs cannot be issued by the officer below the rank of Deputy Secretary to the Government of India or Joint Secretary in the State Government or concerned Superintendent of Police at district level. However, it has not been followed and they have been generated by the in charge of various police stations or Deputy Superintendent of Police or Assistant Commissioner of Police. Hence, O.M 2010 again clarified about the competent authorities to request the opening of LOC. Furthermore it needs to be emphasized that apart from the Central Government, State Government, criminal courts and different agencies (such as the Ministry of Home Affairs, the Customs and Income Tax Department, Directorate of Revenue Intelligence, Central Bureau of Investigation, Interpol, Regional Passport Officers, Police Authorities in various States etc.) dealing with cases of criminal law enforcement, there is no other authority on whose request an LOC can be issued. In Vikram Sharma’s case it was observed that the even statutory bodies like National Commission of Women (NCW) cannot make a request for an issuance of LOC, despite being granted the powers of a civil court.

In addition, the validity period of LOC is for 'one year' and the name of the subject will get automatically removed unless the concerned agency requests for its renewal within a period of one year. However, it has been noted that the originators do not review their LOCs within the stipulated time. Due to which Justice M. Venugopalin *S.Martin v The Deputy Commissioner of Police* (2014) succinctly remarked that "the LOC cannot be issued periodically for an indefinite period and issuance of the same cannot hang on like a Damocles sword on a person's head."

In order to fulfill both the stages of both investigation as well as trial, the LOC can be requested only by the competent authority. The power to prevent individuals' fundamental right to travel is under provisions of Section 10, 10A and 10B of the *Passports Act, 1967* [2002]⁸. However, in Priya Pillai's case, Justice Rajiv Shakhder observed that there might "arise certain situations, outside the scope of the said [The Passports] Act, which may require, the executive of the day, to take recourse to an LOC, under circumstances which are not covered by a statutory enactment." He simply posits those situations and circumstances where the executive cannot take the route of statutory law, so as to carry out both investigation as well as trial against an offender or suspect who is evading arrest or probe. In S.Martin's case, the court clearly held that law permits the concerned authorities to resort to an issuance of LOC in respect of cognizable offences either under Indian Penal Code or other penal laws where he is allegedly involved. However, bypassing statutory law gives immense space to the state to roughshod an individual's right to travel. Unlike a substantive law such as Section 41(1) of Cr.P.C. which gives power to the police to arrest, without an order or warrant from a Magistrate, any person against whom there is a credible information or reasonable complaint or reasonable suspicion; the LOCs lack such a legal definition with any statutory backing.

If we look into *Sumer Singh Salkan & Reema & Others* (2015) and *Sumer Singh Salkan & Ranjeet Narayan & Others* (2010) these cases show how LOCs were issued illegally for an extraneous reason, by an officer who was not even authorized to do so. In order to protect such a drastic misuse of power, substantive guidelines were issued by MHA, and it was substantively mentioned in several crucial judgements by the court. The judiciary played a significant role in protecting the fundamental right to travel by defining LOC which apparently hitherto did not have any legal definition. The powers under the LOC were defined in Vikram Sharma's case as,

⁸ 'The Passport Act' (1967) <http://www.mea.gov.in/Uploads/PublicationDocs/140_The-Passport-Act-1967.pdf> accessed 2 May 2016; 'Passports Amendment Act' (2002) <http://www.mea.gov.in/Uploads/PublicationDocs/136_Passports-Amendment-Act-2002.pdf> accessed 2 May 2016

“The power to suspend, even temporarily, a passport of a citizen, the power to issue an LOC, the power to ‘off-load’ a passenger and prevent him or her from travelling are all extraordinary powers, vested in the criminal law enforcement agencies by the statutory law. These are powers that are required under the law, to be exercised with caution and only by the authorities who are empowered by law to do so and then again only for valid reasons.”

The power to prevent/detain/suspend someone from travelling was regarded an extraordinary power which should be carried out under the ‘law’ only for valid reasons. Here there are two major aspects to be analyzed i.e., explanatory and operative aspects of the LOC. In explanatory part, it needs to be clarified whether Office Memorandum 2010 (O.M 2010) is an enacted law; because Article 13(3) (a) says “law includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law”. However, O.M (2010) is merely an executive instruction or communication circular from the concerned government authorities, which is used in exceptional situations. Secondly, the operative aspect of LOC questions the valid procedures and reasons to issue. In Sumer Singh Salkan’s case the court clearly pronounced the operative element of LOC which is as follows;

- 1. Recourse to LOC can be taken by investigating agency in cognizable offences under IPC or other penal laws, where the accused was deliberately evading arrest or not appearing in the trial court despite Non-bailable warrants (NBWs) and other coercive measures and there was likelihood of the accused leaving the country to evade trial/arrest.*
- 2. The Investigating Officer shall make a written request for LOC to the officer as notified by the circular of Ministry of Home Affairs, giving details & reasons for seeking LOC. The competent officer alone shall give directions for opening LOC by passing an order in this respect.*
- 3. The person against whom LOC is issued must join investigation by appearing before I.O. or should surrender before the court concerned or should satisfy the court that LOC was wrongly issued against him. He may also approach the officer who ordered issuance of LOC & explain that LOC was wrongly issued against him. LOC can be withdrawn by the authority that issued and can also be rescinded by the trial court where case is pending or having jurisdiction over concerned police station on an application by the person concerned.*

4. LOC is a coercive measure to make a person surrender to the investigating agency or Court of law. The subordinate courts' jurisdiction in affirming or cancelling LOC is commensurate with the jurisdiction of cancellation of NBWs or affirming NBWs.

Such a drastic power needs to be exercised in terms of and in consonance with law while remaining within the ambit of the term 'exceptional case' where individual falls under cognizable offences. However, such an extraordinary power turned out to be in vain in front of the enormous money power and wealth of Vijay Malliya, who left India in spite of the issuance of LOC.⁹

Deep Indian State? Case Study of Priya Parameshwaran Pillai vs. Union of India and Others (2015)

Human beings carry out mundane routines or ordinary businesses which are interlaced knowingly or unknowingly with the state. On 11 January 2015, Priya Parameshwaran Pillai had no clue that her normal immigration process was going to be interrupted. The immigration officer stamped "off load" on her passport without any reasons. She was employed as a 'Policy Officer' in Greenpeace India Society. Her campaign was with local communities in Mahan, Madhya Pradesh, which was against the coal mining project in Singrauli Coal belt led by ESSAR Power Ltd and Hindalco. This project potentially threatened to uproot and displace indigenous tribal communities, along with undermining and degrading wildlife besides unfolding pollution in the region. Hence, she was invited by Greenpeace U.K to talk about it with the British Parliamentarians. For that purpose, she was supposed to fly out of Delhi at 6 A.M, 11 January 2015. Despite having a valid visa and a confirmed flight ticket, she was detained while boarding; her baggage was retrieved from the aircraft and "offload" was marked on her passport.

According to the Immigration Officer they detained her because her name stood in LOC, so she was not permitted to travel abroad. She was prevented on the basis of clause 8(j) of the Office Memorandum (2010) which reads that "in exceptional cases, LOCs can be issued without complete parameters and/or case details against counter intelligence suspects, terrorists, anti-national elements, etc., in larger national interest." The court adjudged in Priya Parameshwaran Pillai's case that

⁹ Hindustan Times, 'Vijay Mallya Could Be On Interpol's Wanted Notice. Here's Why' (2016) <<http://www.hindustantimes.com/business/mallya-faces-assets-attachment-interpol-wanted-notice-for-evading-probes/story-QBaG2EvNwak7ZHN9D0kn7M.html>> accessed 2 May 2016

the state does have the power to prevent, but it needs to be exercised within the ambit of law, and while doing so it should not violate any constitutional provisions. Hence, the state can prevent and debar any movement but under aid of the power contained in the statute and not under any non-enacted law or communication circulars.

In Pillai's case the reason behind her detainment was the proposed testimony before an All Party Parliamentary Group (APPG), which also consisted of British Parliamentarians. The state contended that deposing before such a committee, with respect to the concerns of tribal communities in Mahan, would only damage the country's image, hamper and compromise country's economic interest as it may lead to trade and investment sanctions. It could be potentially prejudicial to national interest, as it would be impacting India's image by projecting it negatively in global arena, especially when it was at a crucial juncture striving to attract FDI in infrastructure and manufacturing sectors. Further, these reports could be used as instruments of foreign policy to impede India's growth prospects notably when it requires a massive inflow of FDI. In this situation, her testimony could "rate India at a low level, exposing it to the potentiality of being governed by a sanction regime". Hence, it was categorized as an "anti-national element" impinging the larger national interest. The state justified that the LOC was issued was not to limit all her freedoms but it focused only on the deposition before a foreign parliament.

The court's decision protected the democratic speech and expression, which was being stifled by the deep Indian state. Justice Rajiv Shakti said the assumption drawn by Indian state that her deposition would "negatively impact the image of India...is completely untenable." He further adjudged that impeding her right only because "it is not in sync with policy perspective of the executive is unjust" and "cannot be a reason to prevent her from exercising her fundamental right to travel abroad and, thereby, in effect, disable her from expressing her views on the subject". Hence, there was no basis to issue LOC in this case. While the Indian state does acquire power under Article 19(2) to impose reasonable restrictions under the interests of the sovereignty and integrity and the security of the Indian state. However, the court held that issuing LOC under this clause is not valid and cannot be categorized as a reasonable restriction. The security of the state meant protection against "aggravated form of prejudicial activities which endangers the very existence of the state or in the very least...threatens the life and limb of its citizens". Since her deposition with British Parliamentarians mattered with regard to developmental activities in the Mahan coal block area, thus it could not be construed as an anti-national activity of the kind

envisaged under clause 8(j) of the 2010 O.M. The court even raised serious doubts on the operative part of 2010 O.M. as whether it even had the status of law. In S. Martin's case the court said that "the State, is not denuded of its executive powers only because there is no statute to back the exercise of such a power[and] would have to make good its case that the exercise of power was under a valid law and, in doing so, it did not violate any constitutional provisions."

The court raised serious objection on state interference with the freedom of an individual in a democracy, as it was violative of Article 19(1)(a) and 21. In varied freedoms the right of free speech and expression is essential, which quintessentially includes the right to criticize and dissent. The court elaborated that "criticism, by an individual, may not be palatable; even so, it cannot be muzzled....The state may not accept the views of the civil right activists, but that by itself cannot be a reason good enough to do away with dissent". Hence, the court sternly adjudged that the right to freedom of speech and expression, which includes the right to propagate individual views, which cannot be stifled or impeded, except on grounds as mentioned in Article 19(2). Also, it adjudged that the right to travel abroad is a fundamental right, which is subsumed in the right to life and personal liberty guaranteed under Article 21 of the Constitution. Whilst the curtailment of her right to travel abroad also directly affected and violated right of free speech and expression.

Under this deep Indian state, this case is a striking example of muzzling dissent. Here the legitimate means of movement was being extensively monopolized with surveillance. In Pillai's case, her legitimate means of movement was expropriated because of her deposition. The investigating agencies had been surveilling her actions and movements. It was not any random sorting; rather it was intentional and purposeful sorting. Here it was her personal details, which were employed to monitor her and restrain her travel on airport. In order to issue LOC, the originating authorities required to mention personal details- name, parentage, date of birth, and passport number. The abstract data was manipulated for a particularly defined authoritative purpose. In her case, the passport enabled them to search her from searchable database and classify and distinguish her as an LOC subject and eventually marked the 'offload' stamp. Whilst it is visible rather than being occult that surveillance was ideologically triggered to defend and support foreign investment by clamping down voices of dissent.

Conclusion

The power to prevent under LOC is extraordinary and quite drastic in its nature which abridges individual's right to travel. It becomes even complicated due to the absence of substantive law which can provide legal definition for its lawful existence. Despite the guidelines and instructions there have been serious cases of misuse of power for extraneous grounds. In addition, development in digital technologies proliferated techniques and practices of surveillance, posing the dangers of political surveillance. Moreover, it strikes down the basis of constitutional rights and liberties. The Priya Parameswaran Pillai case reflects the intolerance and unacceptability of dissent by the state and issuance of LOC is sheer brutalization under democracy. Though the state clasped its powers to prevent and surveil, in such a scenario the role of judiciary is significant in forthcoming challenges of unjust and unconstitutional clasping of rights and freedoms in near future.