Article

Online Monitoring of ‘Localists’ in Hong Kong: A Return to Political Policing?

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Abstract

Hong Kong’s new ‘localist’ movement—advocating for total autonomy or even secession—has provoked a crackdown from both the local government and the central authorities in Beijing. This paper argues that the incoming administration of Carrie Lam is likely to continue to pursue online surveillance of localist political groups as one part of this crackdown, but that ultimately this may prove to be counterproductive if the goal is to reduce support for the movement.

Introduction

Modern-day protests are frequently characterized by the use of the internet generally and social media specifically for both internal organization and external communication. This is the case regardless of whether the protests seek ‘revolutionary’ change or are aimed at more discrete policy shifts, and regardless of the political composition of the state: Egypt and Tunisia (Lotan et al. 2011; Breuer et al. 2015; Khonder 2011), Russia (White and McAllister 2014), Ukraine (Tucker et al. 2014), the United Kingdom (Halliday 2011), Canada (Poell and Borra 2012), and the United States (Bonilla and Rosa 2015). This was also the case during the 2014 democratic protest in Hong Kong known as Occupy Central (Tsui 2015). Though this range indicates that governments of varying political stripes face protestors using social media for varying political goals, authoritarian regimes make particular efforts to monitor, control, and thus limit online communication both in the context of ongoing protests and as a pre-emptive measure in order to prevent coalescence of opposition. Russia (Deibert and Rohozinski 2010; Soldatov and Borogan 2013) and China (Lee 2012; Tsui 2003; Wang and Hong 2010; King et al. 2013) are regarded as having particularly effective systems of control in this area. Though Hong Kong is a part of China it operates under a separate legal system that constitutionally recognizes the population’s right to free expression and to privacy. These protections are largely well guarded by the courts (Ramsden and Hargreaves 2015), and so residents of Hong Kong are not subject to the same kinds of intense online surveillance experienced elsewhere in China.

Despite this legal separation, the long arm of the Chinese state security service *has* been felt by Hong Kongers whose activities are perceived as directly meddling in mainland politics in an unwelcome fashion. Recent examples include the seizure of five booksellers who published books in Hong Kong detailing allegations of corruption against senior political figures in the mainland (Forsythe 2016) and the mysterious disappearance of a wealthy tycoon described as “the de facto banker to the Communist Party elite” (Forsythe 2017). Perhaps more significantly, it has also become clear that the *local* political activity of Hong Kong

residents is also under the scrutiny by mainland agents, if that local activity is seen to implicate the position of Hong Kong within China: during Occupy Central, both its leaders and “ordinary” protestors were subject to monitoring by mainland agents (Ng 2014; Lague 2014; *Associated Press* 2014). In this paper, I argue that this monitoring of local political activity—in particular online—is likely to increase in the coming years. Not only by agents of the mainland, however, but by the local police force in Hong Kong as well.

Occupy Central was a manifestation of a long-term political crisis related to the trajectory of Hong Kong’s democratic development (Hargreaves 2015). When Carrie Lam replaces C.Y. Leung as Chief Executive of the Hong Kong Special Administrative Region on July 1, 2017, her administration will have to confront a new development: the rise of a ‘localist’ movement that advocates for complete autonomy or even independence for Hong Kong. Though localism is very much a fringe political position, the outgoing Leung administration chose to confront its emergence aggressively. Following the victory of two localist candidates in elections for Legislative Council in 2016, the Government (Leung and Rimsky Yuen, the Secretary of Justice, were the named plaintiffs) sought an order from the courts disqualifying them on the ground they had intentionally misspoken their oath of office (Lau et al. 2016). Beijing, always on alert for activities it perceives as threats to national sovereignty, ensured its thumb was on the scale: before a final determination regarding the case could be made by the local courts, the Standing Committee of the National People’s Congress issued a pre-emptive “Interpretation” of the Basic Law (Cheung et al. 2016). Setting aside for the moment the question of whether this was a legitimate or necessary use of the Interpretive power, it ensured that the Government’s action would succeed as the local courts were bound to follow it. Beijing thus demonstrated a willingness to be directly involved in confronting the localist issue, and surely will expect Lam to follow its lead and continue the hardline approach of the Leung administration.

However, Lam will *also* recognize that the change in leadership from the deeply divisive Leung she represents offers an opportunity, even if slight, to improve the local political climate. She is likely to want to defuse tensions with those Hong Kongers who, though not localists, are nonetheless concerned that the region’s promised (under the Basic Law) ‘high degree of autonomy’ within China is being steadily eroded. In my view, Lam is likely to try and resist overtures from Beijing to deal with the localist issue by passing a new set of ‘national security’ laws under Art. 23 of the Basic Law, and instead enact a broader domestic campaign of political surveillance. Art. 23 requires Hong Kong to enact laws that “prohibit any act of treason, secession, sedition, subversion against the Central People’s Government...” There are, however, currently no such laws on the books and an attempt to introduce them in 2003 was widely interpreted as a threat to core civil liberties (Chen 2002; Kellogg 2003; Peterson 2002). The proposal faced sustained protest, culminating in a protest march of half a million people and an embarrassing climb-down by the Government—the proposed laws were withdrawn, and the then Chief Executive Tung Chee-hwa resigned two years later for ‘health reasons’. Yet, the Central authorities have indicated they perceive the actions of localists as “subversive activities” that “damage [China’s] sovereignty and security” (*Reuters* 2017)—precisely the language used in Art. 23. Lam’s administration is likely to try and navigate between these shoals by pursuing the kinds of online surveillance against localists that her predecessor began during Occupy Central. This paper concludes by suggesting, however, that this choice may ultimately be counterproductive, serving only to reinforce the localists’ message.

In the colonial period, the ‘Special Branch’ of the Hong Kong police kept close tabs on groups deemed to be potentially subversive by the Government, particularly leftists and those associated with communists in the mainland (Fu and Cullen 2003). The Special Branch was disbanded prior to 1997, though many of its functions (such as its anti-corruption, anti-terror, and vetting of officials) were absorbed by other departments. In general though, the notion that the *local* police might be used by the Government in the service of a particular political agenda had faded from public consciousness. But during Occupy Central, there were indications that the concept of ‘political policing’ was returning in substance, if not the exact form it had taken during the colonial period. Notably, the police began to pay close attention to the online activities of democratic protestors, benefitting from a relatively lax legal framework governing the

collection of information and surveillance in Hong Kong. The Interception of Communications and Surveillance Ordinance (ICSO) came into effect in 2006 following a successful constitutional challenge to its predecessor law on the ground that the previous regime did not meet the appropriate threshold of certainty or legality to justify the restriction on the constitutional right to freedom and privacy of communications that state surveillance necessarily entails (*Leung Kwok Hung* 2006). ICSO therefore more appropriately sets out a clear process of authorization of any interception of communications or covert surveillance (ss. 4-38.) However, “interception” is defined in the Ordinance as “the inspection of... the contents of the communication, in the course of its transmission...” This excludes, then, all metadata—who sent the message, who received the message, associated IP addresses, how it was transmitted, etc., meaning the police do not require judicial authorization to request such information from ISPs. The advocacy group InmediaHK has raised concerns that ICSO’s emphasis on ‘in the course of transmission’ means no authorization is required before the police attempt to access *delivered* internet content (i.e. instant messages and emails) (*InmediaHK* 2015). This has yet to be proven or raised in court, but when directly asked about this possibility in the LegCo, the Secretary for Security deflected and simply repeated the textual requirements of ICSO (LCQ15 2015). The police, of course, also do not need to obtain any sort of authorization to inspect the contents of *public* communications—precisely the kind that the protestors using social media or other kinds of accessible internet forums make in order to communicate with the public. It is also trivially easy for the police to identify such users, since ISPs do not treat IP information as “personal data” within the meaning of Hong Kong’s privacy laws (Hargreaves and Tsui, forthcoming) and in any event the Services-Based Operator Licence they are required to obtain by the Telecommunications Authority allows them to disclose the ‘information’ of customers for the prevention or detection of crime (Telecommunications Ordinance, Cap. 106). This Licence appears to fall short of any kind of judicial authorization requirement, allowing the police to simply request desired information from ISPs. Indeed, in 2015, Government departments and bodies made close to 4,500 requests to ISPs and webhosts for ‘user information’; the police accounted for 87 per cent of these, but refused to disclose how many were accompanied with a court order or how many were complied with (HK Transparency Report 2016). Because ICSO does not apply to public communications, the police force also does not come under the oversight of the Commissioner for Interception of Communications and Surveillance when engaging in surveillance of social media or other open internet fora. This also increases the risk of political bias being introduced into the process.

During Occupy Central, the weakness of this regime became apparent. Section 161 of the Crimes Ordinance prohibits “obtain[ing] access to a computer... with an intent to commit an offence or dishonest intent to deceive”. A plain reading of the provision would suggest an attempt by the legislature to criminalize certain activities dependent upon using a computer, such as hacking or computer-based fraud, rather than the general use of computer in the service of another offence. After all, it would be preposterous to suggest that an individual who made a list of banks to rob in an Excel spreadsheet and researched escape routes with Google Maps should come under the ambit of s. 161. Yet, the police are increasingly relying on it in such an expansive fashion in the context of monitoring political dissent online. In particular, activists argue that police are relying on s. 161 to demand the removal of internet posts that related to the organization or support of democratic protests. Between October of 2014 and February of 2015 (the peak of the Occupy movement), the Hong Kong police issued 101 content removal requests for “obscene articles, phishing websites and accessing a computer with criminal/dishonest intent”, more than the previous four years *combined* (Zhang 2014). There is little transparency in how this process works—Zhang’s research shows that the police sometimes email or phone the administrator of a website directly and demand a specific post be removed; it is not clear if these numbers are included within the official total (Harris 2015). In any event, rather than following a transparent legal procedure that justifies content removal, the police appear to at least on occasion be simply ‘requesting’ the removal of certain public posts with the (presumed) threat of a charge under s. 161 in the event of failure to comply (though whether such criminal liability for internet intermediaries actually exists has not been tested in the courts).

The newfound expansive interpretation of s. 161 in conjunction with the ability to identify internet users means it can be used for more than content removal—if the police can identify the individual behind the online persona making certain kinds statements of related to disruptive protests or civil disobedience, then they might be charged. This was the process that led to the arrest of an individual who had posted organizing information about the Occupy protests in a well-known Hong Kong online forum, HKGolden (Zhang 2014). The individual was charged with “access to a computer with criminal or dishonest intent” (for the post) and “unlawful assembly” (for attending the protest). The police argued that his post encouraged others to join an unlawful assembly, to block access to the MTR (subway) system, and to charge at police in the event of attempted dispersal. The use of s. 161 to charge individuals for contentious speech online in this manner is troubling. First, it seems contrary to the purpose of s. 161, which as indicated appears to have been drafted with specific kinds of ‘computer crimes’ in mind rather than the use of a computer to plan any kind of criminal activity. Second, though the constitutionally-guaranteed rights to expression in Hong Kong are not absolute and can be legitimately limited for public order concerns (Ng Kung Siu 1999), criminalizing the online planning of assembly and demonstration that is to take place several days in the future is surely an unjustifiable restriction. It does not meet the ‘immediate incitement to violence or disorder’ standards that the court has laid out for other kinds of speech restrictions. Yet, the real power of the arrest—and the real purpose of the apparent uptick in politically-based online surveillance in Hong Kong, I suggest—is not the punishment of one individual. The arrest had an immediate chilling effect on a wide range of speech online: users of HKGolden described a notable drop in discussions about attending protests immediately following news of the arrest, and they received a message from the forum administrator suggesting that “everyone could pay more attention [to their online speech]” (Zhang 2014).

This is, of course, the message the Government has already conveyed in multiple ways to Hong Kongers overtly embracing localism—from the aforementioned legal actions against localist legislators (which continue: one councillor was recently charged with desecrating the national flag after turned upside down small PRC flags that pro-Beijing councillors had kept on their desks in the LegCo chamber (Ng and Leung 2017)), to the warning secondary school teachers received from the Education Bureau that they could be fired if they talk about independence in the classroom (Kao 2016), to the denial of licences to pro-independence parties wishing to set up stalls at a Lunar New Year celebration (Cheung 2017), to the seemingly coordinated difficulties localist parties encountered in setting up or maintaining bank accounts (*The Guardian* 2016; *Hong Kong Free Press* 2017). Under the incoming Lam administration online surveillance is likely to continue to be a method by which this message is conveyed—you are being watched, so watch what you say. At a minimum, Lam is likely to continue Leung’s approach: during the election campaign, she made no statements disapproving of her predecessor’s actions, and indeed served as Chief Secretary during his tenure. The only question is how far this process will go—while the Lam administration is unlikely to pursue *overt* censorship of all localist sentiment online thanks to the constitutional protections offered by the Basic Law, continued (and obvious) online surveillance and the occasional arrest for those that go ‘too far’ in their online comments may ultimately achieve much the same result: individuals—particularly youths with their futures ahead of them and career prospects to think about—may choose to self-censor. This technique would also allow Lam to indicate to Beijing that she is clamping down on localist sentiment and give her space to reject a push for new laws under Art. 23.

But there is also the risk for Lam that this ‘cure’, should she pursue it with vigour, may prove worse than the ‘disease’. There is precedent. During Occupy Central, police use of tear-gas and batons against a relatively small number of unarmed high school and university students ended up provoking wider sympathy for the protest (and global media coverage) than otherwise would have occurred. People who had no initial intention to attend the protest joined when they saw media coverage of what was happening. When rumours spread that the Government was seeking to intercept communications between protestors, over 100,000 Hong Kongers downloaded an app that would allow ‘mesh communication’ between smartphones without the need for a mobile service signal or internet connection, thus ensuring that they could communicate freely; 800,000 messages were sent using it shortly thereafter (Mozur and Wong 2014). People who had

nothing to hide but believed themselves to be under surveillance did not stop communicating, but instead sought to route around it, making it harder for the Government to identify ringleaders. Occupy Central flourished in the short term—and its leaders became internationally-recognized figures—at least in part because of mismanagement and heavy-handedness by the Government.

A continuing crackdown on localism by increased policing of online spaces may have the same unintended effects—rather than conveying to Hong Kongers that it is a fringe political position led by inexperienced youth who do not understand the complicated ‘one country, two systems’ formulation that is supposed to govern the relationship between Hong Kong and the rest of China, it may instead provide them with evidence that Hong Kongers’ cherished freedoms are further eroding, paradoxically lending the arguments of localists credibility. The real ‘solution’ to the localist problem in Hong Kong is therefore unlikely to be found in increasing levels of surveillance, the use of draconian legal measures against politicians, or threats that Hong Kong could “lose everything” (Tong 2017). Instead, a solution is more likely to be found by convincing Hong Kongers of the benefits of being a valued part of a rising China, by reassuring them that their political and cultural distinctiveness will be protected, and by adopting policies that make Hong Kong a more economically equal society (Tsoi and Wong 2016). Localist anger over political reform is rooted at least in part in practical rather than ideological concerns—the local Government simply does not address the needs of large segments of the population, in particular youth not from families in the economic elite. If my analysis is accurate, then the real ‘solution’ to localism is not to crack down on youth who speak out, but to address their needs and make Hong Kong a more egalitarian, equal, and effective society. The example of Quebec may be instructive—a long-standing secessionist movement in the province was quelled (if not entirely eliminated) not through a crackdown on speech, association, or assembly by the Canadian government, but through economic growth, a recognition of cultural ‘distinctiveness’, and a model of federalism that gave Quebecers control over what they perceived to be critical aspects of their society (Changfoot and Cullen 2011). While Beijing has made it clear that federalism is not on the cards in China, reducing the highest economic inequality rate in the developed world and reassuring Hong Kongers that their distinctive place in broader Chinese culture will be respected would do far more to tamp down localist sentiment than a heavy online surveillance campaign ever could. Though Lam will no doubt be tempted to follow the path of her predecessor in demonstrating her loyalty to the Central government by going after localists with vigour, she may find it is counterproductive to do so through a crackdown on online dissent.

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