

Legislation and other tactics

Combating human trafficking in Hong Kong

Dennis Kwok

At present, Hong Kong law prohibits certain forms of conduct, including the trade in chattel slavery¹ and trafficking in persons for prostitution.² However, regrettably, there are no specific offences under Hong Kong law of slavery, servitude, forced or compulsory labour, illicit sex tourism, human trafficking or of forced marriage. The Hong Kong Government claims that existing offences provided in different statutes are sufficient to cover all nature of crimes involved with flexibility, which law enforcement officers and lawyers who have handled cases of human trafficking disagree.

Human traffickers are notoriously difficult to prosecute. Often, they exploit older laws to avoid detection, pressure their victims to not give evidence against them, or to evade prosecution. Their crimes are transnational, making it difficult to procure the attendance of witnesses, and gather evidence. The hands of law enforcement are often tied because they are compelled to use out-dated offences designed for other purposes, they may find it difficult to understand archaic language, or they may be faced with victims unwilling to give evidence. In many cases, the only offences that can be prosecuted are accompanied by insufficient sentences, such as fines. Often, prosecutions cannot proceed because they are time barred summary offences.

“[The victim] was left floundering in a system in which concern for victims of human trafficking for forced labour is mainly a rhetorical manoeuvre”, wrote Judge Zervos. “[...]f this case is an example of the effectiveness of the Hong Kong’s regime in tackling human trafficking and forced labour, then it has failed to achieve even the most basic objectives”.

ZN v Secretary for Justice, Court of First Instance of Hong Kong, 2016.

ZN (a pseudonym given by the Court to protect his identity) is a Pakistani national who came to Hong Kong in 2007 after a fellow villager arranged work for him in the city, with the promise of good working conditions and a salary. He ended up working 15 hours a day without pay for four years, up to 2010, during which he was also subjected to constant threats and beatings before his employer tricked him into returning to his home country. ZN later returned to the city illegally in 2012 to claim more than HK\$200,000 (US\$25,480) in unpaid wages, but found himself shunted from one government department to another as each claimed his grievances were not in its remit.

ZN’s lawyers filed a judicial review against the Government arguing that the current absence of offences targeting human trafficking, including forced labour, is a violation of Hong Kong’s obligation under the International Covenant on Civil and Political Rights (ICCPR) and the Hong Kong Bill of Rights. The case went all the way to the Court of Final Appeal; while judges agreed that ZN was a victim of trafficking for forced labour in Hong Kong, the Court of Final Appeal ruled against ZN’s wish that Hong Kong was obliged under international human rights laws to introduce a comprehensive anti-human trafficking law, not least because China specifically excluded Hong Kong from the application of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (the Palermo Protocol) when it signed onto it.

United Nations and Hong Kong

The United Nations’ human rights bodies have repeatedly urged the Hong Kong government to review its policy on preventing and prosecuting human trafficking, and protecting victims in order to comply with its obligation under international human rights treaties. Among other recommendations, they have urged Hong Kong to ratify the Palermo Protocol and to adopt comprehensive anti-human trafficking laws that prohibit all forms of human trafficking, etc.³ Before this, human rights treaty committees in the United Nations have already stated the same concerns in seven previous reviews of Hong Kong’s compliance of the treaties.⁴ In the United Nations’ Human Rights Council’s regular review of China’s human rights situation (the Universal Periodic Review), Ukraine and other countries also raised the concern.

Hong Kong Modern Slavery Bill

I have worked with human rights lawyers to draft the Crimes (Amendment) (Modern Slavery) Bill 2019 (the Modern Slavery Bill) modelled on the UK Modern Slavery Act 2015, and introduced it as a members’ bill together with the Hon Kenneth Leung, in order to show the Government what the current scattered legislative regime is lacking. The Modern Slavery Bill introduces clearly defined serious criminal offences for slavery, servitude, forced or compulsory labour, human trafficking, forced marriage, illegal sex tourism, and related offences.

The first new offence in the Bill is that of “slavery, servitude and forced or compulsory labour” as new Section 162 to the Crimes Ordinance. The definitions of these new offences reflect international law and are directly imported from Article 4 of the Bill of Rights, which specifically requires that they be “forbidden”. At present, there are no equivalent offences in Hong Kong law.

The second offence introduced by the Bill as new Section 163 of the Crimes Ordinance replaces and expands the definition of human trafficking in Section 129. At present, the law only covers trafficking persons for prostitution. This new section would expand the offence to cover other forms of criminal exploitation such as exploitation of children, slavery, servitude, forced or compulsory labour, or the removal of organs. This section brings Hong Kong law in line with international law.

The third new offence is “Committing an Offence with Intent to Commit the Offence of Human Trafficking”, an important new offence. Organised trafficking gangs often rely on breaches of regulatory legislation such as immigration and labour law.



Author speaking at the 2019 UN Forum on Business and Human Rights in Geneva, on a panel examining legislative approaches to eradicate modern slavery in global supply chains. Photo by the Office of Dennis Kwok.

They are able to act with virtual impunity because they do not face sentences with appropriate gravity until it is too late. This new offence serves to enhance the sentences available for traffickers; and makes them easier to prosecute.

The fourth new offence is “forced marriage”. Hong Kong is committed to the abolition of this practice but there is no such offence under the Marriage Ordinance. This new offence remedies this lacuna in the law.

The fifth new offence of “sex tourism” is completely new to Hong Kong law. Under the current law, extraterritoriality is extended to various sexual offences under the Crimes Ordinance.⁵ It is also an offence under the Crimes Ordinance to arrange or advertise the commission of sexual offences against children outside of Hong Kong.⁶ However, unlawful sexual tourism is very difficult to prosecute because the law enforcement must prove the specific offence, and the specific intention. There are no powers to stop someone before they commit offences. There are no offences against travelling with the motivation to commit offences overseas. Nor are there offences against arranging the travel of persons for sex tourism, even if a person knows that a person may be motivated to commit unlawful sexual acts during their travel. This new offence plugs the hole in the law by clearly criminalising illicit sexual tourism – making it much easier for Immigration and the Police to identify, investigate and prosecute these offences.

Furthermore, the Bill provides powers under Organized and Serious Crimes Ordinance (Cap 455) for authorities to intervene in criminal related accounts and proceeds extend to cover those of slavery and human trafficking. Also, it provides a basis for court orders to prevent human trafficking and redress for victims, defence for victims of slavery and trafficking for the offences committed connected to their slavery or trafficking situation, requires sizeable companies to produce human trafficking reports in order to increase supply chains transparency, and to establish an independent anti-slavery commission to enhance and promote the measures to combat and prevent slavery and human trafficking, and to provide assistance and support to the victims.

We drafted the Bill with the understanding that it will not be passed into law, because Hong Kong’s constitution does not allow a lawmaker to introduce a bill that would incur public spending, and requires the Government’s consent when the bill is not in line with current government policies. As expected, in September 2019, the government replied that it refused to support the bill. The bill will, however, remain as a mark to measure the adequacy of Government measures and legislative tools.

Other strategies

In response to the international movement to combat modern slavery, the Hong Kong Government issued the Action Plan to Tackle Trafficking in Persons and to Enhance Protection of Foreign Domestic Helpers in Hong Kong in March 2018. Short of statutory changes, it promised to broaden the application of victim identification to more government departments, and reinstated the prosecution code to not prosecute victims of modern slavery for crimes they committed as a result of being controlled.

The Hong Kong Government used to categorically dismiss reports that Hong Kong is a destination and transit point for human trafficking, thereby justifying the lax law on human trafficking. In August 2020, law enforcement busted a criminal syndicate that smuggled people into Hong Kong for prostitution, labour, and illegal activities, and arrested more than 100 people. For the first time ever, law enforcement recognised this to be human trafficking. This is a breakthrough in terms of the Government ending its denial attitude.

There is a global trend for the financial and business sector to take the lead in this issue. Supply chain transparency is key to uncover modern slavery and ensure its eradication (see also, article by Webber Ziero in this issue). Listing rules, for example, have been a driving force in enhancing transparency and accountability.

The Hong Kong Stock Exchange has recently updated its Environmental, Social and Governance (ESG) disclosure requirements for all listed companies in Hong Kong. For financial years commencing on or after 1 July 2020, all listed companies would be required to make general disclosures on matters such as prevention of forced and child labour in its supply chains, the adoption of requisite employment practices and elimination policies.

As an international financial centre, Hong Kong needs to maintain a high standard of anti-money laundering regime. The Financial Action Task Force has in recent years put focus on modern slavery when evaluating countries. Hong Kong must be able to withstand their strict scrutiny; statutory changes would be inevitable.

It is reassuring that in such a difficult quest, we have the wealth of knowledge and support from a strong network of local and international civil society groups, such as, locally, lawyers like Patricia Ho and Azan Marwah, Stop Trafficking of Persons (STOP), Mekong Club, and regionally and internationally, the Walk Free Foundation, the Financial Sector Commission on Modern Slavery and Human Trafficking (aka the Liechtenstein Initiative), and Thomson Reuters. The exchanges of knowledge and best practice, together with growing public awareness, will empower the changes we need to eradicate modern slavery, and to honour Hong Kong’s commitment to the protection of human rights.

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Notes

- Section 44, OAPO, Cap 212.
- Section 129, CO, Cap 200.
- Committee on the Elimination of Racial Discrimination, ‘Concluding observations on the combined fourteenth to seventeenth periodic reports of China (including Hong Kong, China and Macao, China) (CERD/C/CHN/CO/14-17)’, 19 September 2018, paras. 49-50, <https://tinyurl.com/treatybodyDB-ohchr>
- These are the periodic reviews under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 2018, International Covenant on Civil and Political Rights (ICCPR) in 2013, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 2009 and 2015, Convention on the Rights of the Child (CRC) in 2005 and 2013 and Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 2014.
- Schedule 2 and section 153P, CO.
- Section 153Q, CO.