

# TESTING THE RATCHETING LABOR STANDARDS PROPOSAL: INDONESIA AND THE SHANGRI-LA WORKERS

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*[In 2000, three American academics, Archon Fung, Dara O'Rourke and Charles Sabel, presented a new theory of international labour regulation known as Ratcheting Labor Standards ('RLS'). Though a number of responses to the theory have been published, none has sought to assess the real life effectiveness of RLS by applying it to a practical situation. This article uses the recent labour dispute at the Shangri-La Hotel in Jakarta, Indonesia to test some of the key elements and assumptions of RLS. The article discusses the scope of application of the theory, the limits of the social and market pressures upon which RLS depends, and the role of freedom of association under the theory. The case study reveals that some of the concerns levelled at RLS are unwarranted. However, the article ultimately questions whether RLS, in its current form, can be a viable alternative system of international labour regulation.]*

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## I INTRODUCTION

The characterisation of workers' rights as human rights has not always been apparent. This is despite numerous references to employment in international human rights instruments.<sup>1</sup> As Leary has observed, a 'regrettable paradox' exists where the human rights movement and labour movement 'run on tracks that are sometimes parallel and rarely meet'.<sup>2</sup> The process of globalisation has had a profound impact on the conceptualisation of labour rights. Greater awareness of conditions in distant countries has helped to generate support for the protection of basic rights at work. Whilst evidence of deplorable working conditions around the world has increased significantly, a corresponding reduction in violations of fundamental rights has not eventuated. Consequently, the continued effectiveness of existing systems of labour regulation is now challenged. The inability of current regulatory approaches to respond to political and economic transformations around the world raises questions as to who should be responsible for implementing labour standards.

From the search for more successful strategies to combat labour abuses has come a new proposal for international labour regulation: Ratcheting Labor Standards ('RLS'). Describing the working conditions that exist in the current global context as 'repellent', the authors of the proposal, Archon Fung, Dara O'Rourke and Charles Sabel, aimed to use the same forces of globalisation that have contributed to these conditions to develop a new approach for implementing international labour standards.<sup>3</sup> Their RLS theory developed in response to transformations in the global economy that have 'outpaced traditional labor laws and regulatory institutions'.<sup>4</sup> RLS is said to chart a course 'beyond conventional top-down regulation based on uniform standards on the one hand, and reliance on voluntary initiatives taken by corporations in response to social protest on the other'.<sup>5</sup>

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<sup>1</sup> See, eg, Universal Declaration of Human Rights, GA Res 217A, UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/RES/217A (III) (1948); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 3 January 1976).

<sup>2</sup> Virginia Leary, 'The Paradox of Workers' Rights as Human Rights' in Lance Compa and Stephen Diamond (eds), *Human Rights, Labor Rights, and International Trade* (1996) 22.

<sup>3</sup> Archon Fung, Dara O'Rourke and Charles Sabel, 'Realizing Labor Standards: How Transparency, Competition and Sanctions Could Improve Working Conditions Worldwide' (2001) 26 *Boston Review* 1, 1 <<http://bostonreview.net/BR26.1/fung.html>> at 1 May 2004. Archon Fung is Assistant Professor of Public Policy at the John Kennedy School of Government at Harvard University; Dara O'Rourke is Assistant Professor of Environmental and Labor Policy in the Department of Urban Studies and Planning at the Massachusetts Institute of Technology; Charles Sabel is Professor of Law and Social Science at Columbia Law School at Columbia University.

<sup>4</sup> Archon Fung, Dara O'Rourke and Charles Sabel, 'Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace' (World Bank Social Protection Discussion Paper No 0011, May 2000) 1 <<http://www.worldbank.org/participation/ratchet.doc>> at 1 May 2004.

<sup>5</sup> Fung, O'Rourke and Sabel, 'Realizing Labor Standards', above n 3, 2.

Several responses to RLS, both encouraging and critical, have already been published,<sup>6</sup> yet none has considered the application of the theory in practice. However, the importance of location in understanding regulatory initiatives and international labour standards should not be underestimated.<sup>7</sup> One way of exploring RLS and the criticisms directed at it is to put it into context, thereby establishing whether the theory and its practical application can be reconciled. This article examines the potential real life operation of RLS in Indonesia, drawing on the example of the workers at the international Shangri-La Hotel in Jakarta who were recently fighting for the right to freedom of association. The conclusions that emerge dispel some fears about RLS but intensify others.

The examination concentrates on three particular aspects of RLS: its scope of application; the ability of social and market pressures to influence firms; and the role of freedom of association under the theory. Both the RLS authors and commentators have identified potential problems in the scope of application of the theory beyond the multinational corporation ('MNC') producing goods in developing countries for consumption in developed ones. Yet no attempt has been made to apply the principles of RLS to the service sector. The assumptions regarding corporate reaction to consumer demands have also not been challenged. Similarly, the difficulties associated with securing freedom of association in a particular setting under RLS have been outlined in broad theoretical terms, yet no practical assessment of how this affects the theory has been made. This article goes beyond the existing discussion of RLS, and investigates how the theory would apply in practice to an industry not contemplated by the RLS authors, and to the attainment of a fundamental labour right that is difficult to secure.

Part II of this article examines the RLS proposal and the motivation behind its development. The principles that form the basis of the regulatory system are discussed, as well as the methods and institutions that distinguish RLS from other forms of international labour regulation. A number of responses to the RLS proposal are noted, which provide an overview of the criticisms levelled at the theory. I argue, however, that these reviews are inadequate in determining the utility of RLS in practice.

Part III discusses labour regulation in Indonesia, and provides the labour dispute at the Shangri-La Hotel as an example. This case illustrates the gap between law and practice that exists in Indonesia, and the inadequacy of State protection of labour rights. Part IV considers the practical application of RLS by assessing the intricacies of labour regulation in this specific local environment, and the actual behaviour of workers, consumers, corporations and the State

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<sup>6</sup> See the eight responses published in 'New Democracy Forum: Stepping up Labor Standards' (2001) 26 *Boston Review* <<http://bostonreview.net/BR26.1/contents.html>> at 1 May 2004: Ian Ayres, 'Monetize Labor Practices'; Pranab Bardhan, 'Some Up, Some Down'; Kaushik Basu, 'The View from the Tropics'; Robin Broad, 'A Better Mousetrap?'; Mark Levinson, 'Wishful Thinking'; David Moberg, 'Unions and the State'; Guy Standing, 'Human Development'; Heather White, 'Educating Workers'; Archon Fung, Dara O'Rourke and Charles Sabel, 'Fung, O'Rourke, and Sabel Respond'. See also Jill Murray, 'The Sound of One Hand Clapping? The "Ratcheting Labour Standards" Proposal and International Labour Law' (2001) 14 *Australian Journal of Labour Law* 306; Adelle Blackett, 'Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct' (2001) 8 *Indiana Journal of Global Legal Studies* 401.

<sup>7</sup> Blackett, above n 6, 403.

during the Shangri-La dispute. The case study reveals that the scope of application of RLS is capable of extension beyond the factory to other industries such as the service sector. However, it is argued that the assumptions made in RLS concerning the anticipated reaction of firms to consumer demands are incorrect. I also question the purported ability of RLS to secure for workers the one right it recognises: the right to freedom of association.

## II THE RLS PROPOSAL

RLS aims to achieve the most effective regulatory framework for the protection of labour rights. Fung, O'Rourke and Sabel argue that labour markets must be re-regulated to curb abuses of basic rights.<sup>8</sup> They describe the standards contained in the eight 'core' conventions of the International Labour Organization as 'a compact list of incontestable human rights of the workplace'.<sup>9</sup> These rights include freedom of association and the right to bargain collectively, the prohibition of forced and child labour, and non-discrimination in employment. The central question posed by Fung, O'Rourke and Sabel is how best to protect 'vulnerable groups against the abuses identified in core labor standards'.<sup>10</sup> This aim is common to both the ILO and RLS, but their adopted methods are vastly different. RLS is driven by the belief that existing approaches to regulation have failed to secure protection for workers.

### A RLS Criticism of Existing Regulation

The conventional 'top-down' regulation rejected by RLS refers primarily to the work of the ILO. Conventional regulation is defined as a system that 'entrusts monitoring of compliance to national and international governmental agencies'.<sup>11</sup> The ILO is the key traditional actor in the field of international labour regulation, and serves as the principal source of international labour standards.<sup>12</sup> At the 1996 World Trade Organization Ministerial Conference in

<sup>8</sup> Fung, O'Rourke and Sabel, 'Ratcheting Labor Standards', above n 4, 4.

<sup>9</sup> Ibid. The core conventions are: *Convention concerning Forced or Compulsory Labor*, opened for signature 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932); *Convention concerning the Abolition of Forced Labor*, opened for signature 4 July 1957, 320 UNTS 291 (entered into force 17 January 1959); *Convention concerning Freedom of Association and Protection of the Right to Organize*, opened for signature 31 August 1948, 68 UNTS 17 (entered into force 4 July 1950); *Convention concerning the Application of the Principles of the Right to Organize and to Bargain Collectively*, opened for signature 18 August 1949, 96 UNTS 257 (entered into force 18 July 1951); *Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, opened for signature 2 August 1951, 165 UNTS 303 (entered into force 23 May 1953); *Convention concerning Discrimination in Respect of Employment and Occupation*, opened for signature 5 July 1958, 362 UNTS 31 (entered into force 15 June 1960); *Convention concerning Minimum Age for Admission to Employment*, opened for signature 26 June 1973, 1015 UNTS 297 (entered into force 19 June 1976) ('*Minimum Age Convention*'); *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, opened for signature 17 June 1999, 38 ILM 1207 (entered into force 10 November 2000) ('*Worst Forms of Child Labour Convention*').

<sup>10</sup> Fung, O'Rourke and Sabel, 'Ratcheting Labor Standards', above n 4, 4.

<sup>11</sup> Ibid.

<sup>12</sup> See Breen Creighton, 'The Internationalisation of Labour Law' in Richard Mitchell (ed), *Redefining Labour Law: New Perspectives on the Future of Teaching and Research* (1995) 90, 91; Murray, above n 6, 307; John Braithwaite and Peter Drahos, *Global Business Regulation* (2000) 237.

Singapore, the ILO was affirmed as the ‘competent body’ to set and deal with internationally recognised labour standards.<sup>13</sup> Yet the RLS authors question why Non-Governmental Organisations (‘NGOs’) are ‘so prominent in new movements that the ILO, given its mandate and history, should be leading’.<sup>14</sup>

Criticism of the ILO is not limited to that offered by the RLS authors.<sup>15</sup> For example, Cooney casts doubt on the ILO’s ability to promote the interests of workers in a globalised world by highlighting its problematic representational structures, its cumbersome procedures and its superficial monitoring system.<sup>16</sup> The ILO has attempted to reform itself by promoting ‘core’ rights. However, the RLS authors query the effectiveness of these standards, commenting that ‘little is achieved, and much may be jeopardized, by defining human rights of labor too narrowly, and then entrusting the enforcement of “core” rights to existing international organizations’.<sup>17</sup>

Fung, O’Rourke and Sabel point to the intrinsic ambiguities of core standards. They question how fixed rules can respond, for example, to child labour, ‘where simple prohibitions, if enforced, can push children out of abusive factory work into outright prostitution’.<sup>18</sup> The authors also detect limits inherent in the corporate self-regulatory approach to labour rights protection. In response to public scrutiny, corporations are pressured to adopt and adhere to codes of conduct.<sup>19</sup> The RLS authors are not the first to expose the inadequacies of this approach. Voluntary codes of conduct are limited by the scope of public pressure, for only firms with an identifiable image are susceptible to influence from consumers.<sup>20</sup> Moreover, initial occurrences of collaboration between firms and auditors has created a general scepticism of this form of regulation.<sup>21</sup> In

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<sup>13</sup> *Singapore Ministerial Declaration*, WTO Doc WT/MIN(96)/DEC/W (1996) [4] (Declaration and Working Documents). This statement was made in response to debate concerning the inclusion of a ‘social clause’ (a clause linking international trade and labour standards) in the *GATT/WTO*. The inclusion of such a clause is proposed as another method to protect labour rights. See further Virginia Leary, ‘The WTO and the Social Clause: Post-Singapore’ (1997) 8 *European Journal of International Law* 118; Johanna Sutherland, ‘International Trade and the *GATT/WTO* Social Clause: Broadening the Debate’ (1998) 14 *Queensland University of Technology Law Journal* 83; Nigel Haworth and Stephen Hughes, ‘Trade and International Labour Standards: Issues and Debates over a Social Clause’ (1997) 39 *Journal of Industrial Relations* 179; Erika de Wet, ‘Labor Standards in the Globalized Economy: The Inclusion of a Social Clause in the *General Agreement on Tariffs and Trade/World Trade Organization*’ (1995) 17 *Human Rights Quarterly* 443.

<sup>14</sup> Fung, O’Rourke and Sabel, ‘Realizing Labor Standards’, above n 3, 15.

<sup>15</sup> See, eg, Sean Cooney, ‘Testing Times for the ILO: Institutional Reform for the New International Political Economy’ (1999) 20 *Comparative Labor Law and Policy Journal* 365; Creighton, above n 12; Andrew Frazer and Chris Nyland, ‘In Search of the Middle Way: The ILO, Standard Setting and Globalisation’ (1997) 10 *Australian Journal of Labour Law* 280.

<sup>16</sup> Cooney, above n 15, 381.

<sup>17</sup> Fung, O’Rourke and Sabel, ‘Fung, O’Rourke, and Sabel Respond’, above n 6, 1.

<sup>18</sup> Fung, O’Rourke and Sabel, ‘Ratcheting Labor Standards’, above n 4, 5.

<sup>19</sup> Douglass Cassel, ‘Corporate Initiatives: A Second Human Rights Revolution?’ (1996) 19 *Fordham International Law Journal* 1963, 1972.

<sup>20</sup> Lance Compa and Tashia Hinchliffe-Darricarrère, ‘Enforcing International Labor Rights through Corporate Codes of Conduct’ (1995) 33 *Columbia Journal of Transnational Law* 663, 674; Fung, O’Rourke and Sabel, ‘Realizing Labor Standards’, above n 3, 20.

<sup>21</sup> Katherine Hagen, ‘Issues Involving Codes of Conduct from an ILO Perspective’ (1998) *American Society of International Law: Proceedings of the 92<sup>nd</sup> Annual Meeting*, 267, 274; Fung, O’Rourke and Sabel, ‘Realizing Labor Standards’, above n 3, 8.

addition, no common measure exists for comparing companies, and as a result, firms have no 'level playing field' in which to strive for better social performance.<sup>22</sup> RLS attempts to overcome these limitations. As Moberg argues, RLS is a 'sophisticated elaboration of trends in corporate codes of conduct and private monitoring'.<sup>23</sup>

## B *The RLS Proposal*

The RLS proposal has two key elements. Firstly, it would 'use monitoring and public disclosure of working conditions to create official, social, and financial incentives for firms to monitor and improve their own factories and those of suppliers'.<sup>24</sup> Secondly, the data collected by monitors would 'create an easily accessible pool of information with which the best practices of leading firms could be publicly identified, compared, and diffused to others in comparable settings'.<sup>25</sup> The combination of these two elements would result in provisional minimum standards of corporate behaviour. Market competition, driven by social and regulatory pressures, would then generate improvements resulting in the 'ratcheting up' of standards. The theory depends entirely on the notion of 'ethical consumerism' — the idea that it costs more to produce goods under acceptable labour conditions, but that consumers would accept this price increase and that firms would be influenced to improve their labour practices accordingly.<sup>26</sup>

### 1 *RLS Principles*

RLS is based on four principles: transparency, competition, continuous improvement, and sanctions. Transparency ensures that

consumers, workers, activists, and the public at large have the information they need to accurately and confidently identify initiatives to improve labor standards, gauge the results of those efforts, and compare the successes of firms, localities, and even nations against one another.<sup>27</sup>

Full transparency then makes possible the second principle of competition, or competitive comparison. Complete and transparent social performance data would enable 'precise and quick assessments of labor conditions of firms in comparison to their competitors'.<sup>28</sup> The lynchpin of the theory is that more firms would strive for consumer loyalty on the basis of their labour standards, as refusal to participate in the RLS system would be equated to poor performance. Competition leads to the principle of continuous improvement. This comprises the force of social and market pressures, whereby firms would be motivated to constantly improve labour practices so as to retain consumer respect.<sup>29</sup>

The final principle of RLS is sanctions. Fung, O'Rourke and Sabel assert that a regulatory system encompassing the first three principles requires both formal

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<sup>22</sup> Fung, O'Rourke and Sabel, 'Realizing Labor Standards', above n 3, 9.

<sup>23</sup> Moberg, above n 6, 1.

<sup>24</sup> Fung, O'Rourke and Sabel, 'Realizing Labor Standards', above n 3, 2.

<sup>25</sup> *Ibid.*

<sup>26</sup> See *ibid* 7 for a more detailed discussion of the concept of ethical consumerism.

<sup>27</sup> *Ibid* 9.

<sup>28</sup> *Ibid* 11.

<sup>29</sup> *Ibid.*

and informal sanctions.<sup>30</sup> They argue that ‘more forceful regulatory institutions backed by punishments ... are necessary to extend and deepen the promising dynamics behind [civic action and corporate response]’.<sup>31</sup> However, RLS would not punish firms for failing to meet established standards. The approach aims to ‘use public power to dislodge information that would in turn trigger more nuanced and ultimately powerful incentives to improve social performance’.<sup>32</sup> The RLS authors maintain that traditional sanctions ‘can encourage firms to evade the monitoring and comparison that are essential to improving labor conditions’.<sup>33</sup>

## 2 *Regulatory Approach*

Fung, O’Rourke and Sabel question the traditional use of fixed rules to protect rights. RLS aims to avoid the charge made by many developing countries that the imposition of Western or developed country standards is a protectionist device rather than an attempt to protect human rights.<sup>34</sup> Some commentators claim that imposing minimum labour standards removes the comparative advantage enjoyed by developing states given their low production and wage costs.<sup>35</sup> Moreover, many ILO conventions and recommendations are regarded as ‘aspirational’, setting levels that only wealthy countries can achieve.<sup>36</sup> RLS, on the contrary, would not impose universal rules. Its standards would be ‘demanding because they are based on what the leaders have done, yet demonstrably feasible because they have been implemented under competitive and comparable conditions’.<sup>37</sup>

The RLS objection to fixed rules does not extend, however, to the right to freedom of association. In every other respect, RLS lacks a normative component, rejecting the benefit of centrally determined labour rules with universal application.<sup>38</sup> Generally under RLS, ‘corrigible yet enforceable standards’ would be the product, not the starting point, of the regulatory

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<sup>30</sup> Ibid 12–13.

<sup>31</sup> Ibid 12.

<sup>32</sup> Ibid 13. But Murray, above n 6, 319, notes that no concrete proposals for new kinds of sanctioning are made. Broad, above n 6, 3, points out that it is not clear how RLS sanctions would work.

<sup>33</sup> Fung, O’Rourke and Sabel, ‘Realizing Labor Standards’, above n 3, 13.

<sup>34</sup> But see Broad, above n 6, 2, who argues that ‘the only way to avoid charges of protectionism is not to rely exclusively on diverse and flexible standards but to have uniform rights that should be recognised whatever the context’.

<sup>35</sup> See Rod Lambert and Donella Caspersz, ‘International Labor Standards: Challenging Globalization Ideology?’ (1995) 8 *The Pacific Review* 569, 575; Eddy Lee, ‘Globalization and Labor Standards: A Review of Issues’ (1997) 136(2) *International Labor Review* 173, 177; Mari Pangestu, ‘Social Clause and International Trade’ (1996) 24 *Indonesian Quarterly* 128, 129; de Wet, above n 13, 449; Amanda Coulthard, ‘Minimum Labour Standards in the Asia-Pacific Region: A Social Clause in APEC’ in Richard Mitchell and Jesse Min Aun Wu (eds), *Facing the Challenge in the Asia-Pacific Region: Contemporary Themes and Issues in Labour Law* (1997) 52.

<sup>36</sup> Cooney, above n 15, 373; Braithwaite and Drahos, above n 12, 234.

<sup>37</sup> Fung, O’Rourke and Sabel, ‘Realizing Labor Standards’, above n 3, 15. See also Murray, above n 6, 319–20, who argues that given the authors’ aversion to fixed rules, the standards they espouse presumably differ, either in form or in the way they are enforced, from the standards promoted by the ILO

<sup>38</sup> Murray, above n 6, 319.

approach.<sup>39</sup> Freedom of association, though, is an ‘essential implication’ of the theory.<sup>40</sup> Guaranteeing this right would provide workers with the opportunity to conduct social audits and workplace monitoring. Just how RLS would secure this right in practice is examined below.

The RLS approach to regulatory bodies differs from existing methods of regulation. The theory requires that firms adopt their own code of conduct and participate in a social monitoring program,<sup>41</sup> with monitors selected from a pool of existing NGOs, national regulators, unions, and transnational organisations like the ILO, United Nations or the World Bank.<sup>42</sup> A ‘super-monitor’ is fundamental to the effective implementation of RLS. The results from individual monitoring would be reported to the ‘super-monitor’. The ‘super-monitor’ would monitor the other monitors to guarantee the integrity and comparability of auditing data and methods.<sup>43</sup> The ‘super-monitor’ would then disseminate information on firm rankings together with the methods employed by individual monitors in evaluating compliance. The outcome is claimed to be an environment where labour standards ratchet upwards in the quest for continuous improvement and consumer endorsement of a firm’s social practices.<sup>44</sup>

### C *Responses to the RLS Proposal*

While welcoming the attempt to improve international labour rights regulation, many commentators have raised doubts about RLS. Criticism of the theory has ranged from the idea that fixed rules should not be rejected because ‘some uniform standards are legitimate, whatever the level of development’,<sup>45</sup> to unease about the principles of continuous improvement and ratcheting, and the fear that corporations will be less likely to cooperate with RLS institutions if nothing they do ultimately proves sufficient.<sup>46</sup> The monitoring process is similarly questioned. Many predict that monitors would ‘be captured by political as well as industrial interests’, and would feel strong pressure to collaborate with the businesses that employ them.<sup>47</sup>

A primary criticism of the RLS theory is its reliance on consumer concern in developed countries and the effect that this has on its scope of application. RLS requires that firms improve labour practices in response to consumer protests. This in turn demands that for labour standards to ratchet upwards, consumers in developed countries must be aware of, and take action against, labour rights abuses. Public action may be restricted, however, to the production of brand name goods sold in such countries.<sup>48</sup> Critics similarly worry that consumer concern can be misguided. They ask why consumers should determine the labour

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<sup>39</sup> Fung, O’Rourke and Sabel, ‘Realizing Labor Standards’, above n 3, 15.

<sup>40</sup> *Ibid* 19.

<sup>41</sup> *Ibid* 2.

<sup>42</sup> *Ibid*.

<sup>43</sup> *Ibid*.

<sup>44</sup> Fung, O’Rourke and Sabel, ‘Ratcheting Labor Standards’, above n 4, 1–2.

<sup>45</sup> Moberg, above n 6, 1.

<sup>46</sup> Ayres, above n 6, 2.

<sup>47</sup> *Ibid*. See also Moberg, above n 6, 2; Levinson, above n 6, 2.

<sup>48</sup> Basu, above n 6, 2; Moberg, above n 6, 3; Levinson, above n 6, 1.

issues to be addressed in distant countries rather than the workers themselves.<sup>49</sup> White suggests that until workers possess complete knowledge of their rights and entitlements, they will be overly dependent on outsiders to initiate improvements, which may or may not happen.<sup>50</sup>

The importance of promoting the voice of workers has led many to criticise the role given to unions in RLS. Broad argues that once freedom of association exists in a country, it should be for unions to ratchet up standards.<sup>51</sup> Similarly, Moberg is adamant that unions, as a historic force for improving workers' conditions, should be strengthened rather than replaced with a 'weak, inadequate, and privatized regulatory system'.<sup>52</sup> Yet under RLS, unions would compete with NGOs to see which makes the better monitor. More disconcerting is the lack of detail about how freedom of association would be secured in individual countries. RLS is criticised for its failure to consider how national laws would impact on the proposed regulatory framework.<sup>53</sup> It is argued that the theory must be reassessed in light of the distinct contexts of labour regulation in different states if it is to prove effective.<sup>54</sup>

### III LABOUR REGULATION IN INDONESIA AND THE CASE OF THE SHANGRI-LA JAKARTA HOTEL WORKERS

Indonesia is a prime example of a country where existing methods of labour regulation have failed to protect workers. There is an enormous gap between the text of laws and reality. Indonesia has ratified numerous ILO conventions, yet these reforms have not translated into concrete protections in practice.<sup>55</sup> To date, private initiatives remain limited and inadequate. This ineffective system of labour regulation supports the need for a new regulatory approach. The Indonesian example may therefore present an ideal situation for the application of RLS principles. However, analysis of the domestic context reveals certain problems that must be overcome if RLS is to achieve more than just paper protection of workers' rights.

#### A *Interaction of RLS and the Domestic Context*

The RLS authors do not reflect on how RLS would operate in specific local situations. The theory considers the domestic context to the extent that it does not aim (initially) to hold employers in developing countries to the same standards as employers in developed ones.<sup>56</sup> Despite this sensitivity to the constraints of developing countries, RLS does not contemplate the interaction of state law and

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<sup>49</sup> Basu, above n 6, 2; Murray, above n 6, 332.

<sup>50</sup> White, above n 6, 1.

<sup>51</sup> Broad, above n 6, 2.

<sup>52</sup> Moberg, above n 6, 1.

<sup>53</sup> Blackett, above n 6, 420, fn 63.

<sup>54</sup> Sean Cooney and Richard Mitchell, 'What is Labour Law Doing in East Asia?' in Sean Cooney et al (eds), *Law and Labour Market Regulation in East Asia* (2002) 246, 268.

<sup>55</sup> Laksamana.net, *Quietly, Shangri-La Dispute Settled* (2003) <<http://www.laksamana.net/print.cfm?id=5108>> at 1 May 2004.

<sup>56</sup> Fung, O'Rourke and Sabel, 'Realizing Labor Standards', above n 3, 3.

private regulation. As Blackett argues:

The proposed Ratcheting Labor Standards framework ... seeks to provide a fluid alternative to promote enforceable standards, but without grappling with the interplay between these corporate focused mechanisms and the already pluralistic labor relations model.<sup>57</sup>

An appreciation of the interaction between international agencies, nation states and individual economic actors is crucial to an understanding of the dynamics of regulation at the international level.<sup>58</sup> Silence on this issue enables the RLS authors to avoid the complications that can arise when a foreign regulatory system is applied in a domestic context.<sup>59</sup> Cooney and Mitchell contend that to be effective, a proposal for regulatory reform must 'speak to the distinct contexts of labour law' in which it will apply.<sup>60</sup>

It is possible, however, that the domestic context is precisely what the RLS authors wish to avoid. The RLS thesis is premised on the assumption of a regulatory void in the domestic jurisdictions of developing countries.<sup>61</sup> That is, these countries do not have national governments with effective regulatory bodies. There are legitimate reasons for maintaining this position. Many states, including Indonesia, are viewed as so weak or corrupt as to render them unable to protect the basic rights of citizens. Many commentators argue, however, that international approaches to labour protection should not ignore or give up on the state as a regulatory medium.<sup>62</sup> While the RLS thesis aims to overcome the failures of existing regulatory mechanisms, it does not attempt to do so by improving the dysfunctional state systems themselves. RLS assumes that the market — irrespective of local conditions — is capable of ensuring that labour rights are promoted. This assumption is incorrect and leads to a serious omission in RLS. It is not possible to insulate the market from the powers and interests that shape politics.<sup>63</sup>

Fung, O'Rourke and Sabel must concern themselves with context for two reasons. The first is that while they do not aim to improve ineffective state systems, they do intend to influence national laws. The RLS authors ultimately hope that '[s]tates could transform their own regulatory systems from fixed-rule to ratcheting'.<sup>64</sup> As simple as this sounds, there is an abundance of literature on the difficulties associated with proposing foreign laws or legal institutions to

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<sup>57</sup> Blackett, above n 6, 420, fn 63. See also Murray, above n 6, 326.

<sup>58</sup> Murray, above n 6, 306–7.

<sup>59</sup> Cooney and Mitchell, above n 54, 267: These complications relate to the ways in which foreign legal systems or concepts are affected by the local relationships between law, politics, economics and other social systems.

<sup>60</sup> Ibid 268.

<sup>61</sup> Murray, above n 6, 326.

<sup>62</sup> See David Trubek, Jim Mosher and Jeffrey Rothstein, 'Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks' (2000) 25 *Law and Social Inquiry* 1187, 1193; Cooney and Mitchell, above n 54, 267.

<sup>63</sup> Kanishka Jayasuriya, 'Governance, Post-Washington Consensus and the New Anti-Politics' in Tim Lindsey and Howard Dick (eds), *Corruption in Asia: Rethinking the Governance Paradigm* (2002) 24, 34; Howard Dick, 'Corruption and Good Governance: The New Frontier of Social Engineering' in Lindsey and Dick, *Corruption in Asia*, above this note, 71, 79; Gary Goodpaster, 'Reflections on Corruption in Indonesia' in Lindsey and Dick, *Corruption in Asia*, above this note, 87, 105.

<sup>64</sup> Fung, O'Rourke and Sabel, 'Realizing Labor Standards', above n 3, 18.

replace or stand beside another society's legal system.<sup>65</sup> In the 1970s, Kahn-Freund developed the metaphor of the 'rejected transplant' to explain the failure of introduced laws to achieve their desired outcomes.<sup>66</sup> Numerous factors, including economics, culture, politics, and religion have been identified as influencing the successful reception of foreign sources into the domestic context.<sup>67</sup>

The impact of outside intervention in a society like Indonesia is unpredictable, particularly where the assumptions underlying the regulatory model are drawn from experiences in developed countries.<sup>68</sup> In many cases the receiving state either 'rejects or ignores' the foreign intrusion into its system.<sup>69</sup> In Indonesia, the preference for informal ways of doing business has meant governance reform has failed.<sup>70</sup> Lindsey and Masduki argue that since 1966, Indonesia has consistently failed to implement the standards (transplants) urged upon it by developed countries and international organisations.<sup>71</sup>

The second reason why RLS must consider the domestic context is to assess how the domestic situation affects the immediate implementation of the theory. Irrespective of its future desire to influence national laws, RLS still relies on the existence of particular local conditions. Transplanted laws and regulatory systems often expect certain elements in a society — a framework of institutions, incentive structures, customs, practices, the rule of law — that do not necessarily exist in reality.<sup>72</sup> RLS presumes and requires a specific local environment. For example, freedom of association is an 'essential implication' of RLS.<sup>73</sup> It cannot be assumed, however, that mechanisms exist in the domestic realm to ensure such a right. Similarly, the political nature of law and enforcement and the pervasion of corruption in an individual state must be understood as potential hindrances to regulatory reform. Many developed country transplants, such as

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<sup>65</sup> See Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1; William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 *American Journal of Comparative Law* 489; Loukas Mistelis, 'Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform — Some Fundamental Observations' (2000) 34 *International Lawyer* 1055; Thomas Walde and James Gunderson, 'Legislative Reform in Transitional Economies: Western Transplants: A Short-cut to Social Market Economy Status?' in Ann Seidman, Robert Seidman and Thomas Walde (eds), *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* (1999) 86; Sean Cooney et al (eds), *Law and Labour Market Regulation in East Asia* (2002); Alan Watson, *Legal Transplants: An Approach to Comparative Law* (1974).

<sup>66</sup> Kahn-Freund, above n 65, 6.

<sup>67</sup> See *ibid*; Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61 *Modern Law Review* 11; Ugo Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) 45 *American Journal of Comparative Law* 5; Cooney et al (eds), above n 65.

<sup>68</sup> Cooney and Mitchell, above n 54, 267.

<sup>69</sup> Gary Goodpaster, 'The Rule of Law, Economic Development and Indonesia' in Tim Lindsey (ed), *Indonesia: Law and Society* (1999) 21, 28.

<sup>70</sup> Tim Lindsey, 'History Always Repeats? Corruption, Culture, and "Asian Values"' in Lindsey and Dick, *Corruption in Asia*, above n 63, 14.

<sup>71</sup> Tim Lindsey and Teten Masduki, 'Labour Law in Indonesia after Suharto: *Reformasi* or *Replay*?' in Sean Cooney et al (eds), *Law and Labour Market Regulation in East Asia* (2002) 27, 32.

<sup>72</sup> Goodpaster, 'The Rule of Law, Economic Development and Indonesia', above n 69, 28.

<sup>73</sup> Fung, O'Rourke and Sabel, 'Realizing Labor Standards', above n 3, 19.

RLS, are 'inelegantly grafted' onto the local context with little consideration of how rights could be meaningfully promoted.<sup>74</sup>

### B Law and Labour Regulation in Indonesia

Indonesia is currently undergoing a difficult process of reform. The transition to democracy brought about by the collapse of Suharto's New Order regime in May 1998 has given rise to many challenges, particularly in the area of law reform. The system of law in operation under Suharto was notable for its uncertainty, judicial corruption and the political nature of judicial decision-making.<sup>75</sup> The disastrous impact of the 1997 Asian economic crisis was blamed largely on the failure of the State to provide a transparent and predictable administration.<sup>76</sup> Suharto's fall in the wake of the crisis led subsequent political leaders to look to law reform for legitimacy. Whether Indonesia's complex legal system can deal with the challenges of reform is uncertain.<sup>77</sup> This changing local context and legal culture will have a critical impact on whether RLS could effectively operate in Indonesia.

The enforcement of laws in Indonesia has not improved.<sup>78</sup> The rule of law is not yet normative.<sup>79</sup> In fact, law has been used as an instrument of repression to ensure 'regime stability'.<sup>80</sup> The system of regulation is characterised by what Goodpaster describes as 'authority and patronage-based', rather than rule-based decision-making.<sup>81</sup> In this sense, political culture is law. Indonesia fits within the category of 'political law' systems as defined by Mattei, where politics and law cannot be formally separated.<sup>82</sup> This characteristic of law in Indonesia, which has so far prevented the effective implementation of regulatory reforms, should be recognised as an obstacle likely to affect the RLS proposal.

In the area of labour law, attempts have been made to develop a more effective industrial relations framework. Weaknesses, however, still pervade the system.<sup>83</sup> On paper, the fundamental rights already granted to Indonesian workers are impressive. They include the right to organise into trade unions, the right to bargain and strike, and the provision of certain minimum standards, such

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<sup>74</sup> Blackett, above n 6, 415.

<sup>75</sup> Tim Lindsey, 'An Overview of Indonesian Law' in Tim Lindsey (ed), *Indonesia: Law and Society* (1999) 1, 8.

<sup>76</sup> Tim Lindsey, 'From Rule of Law to Law of the Rulers — to Reformation?' in Tim Lindsey, *Indonesia: Law and Society* (1999) 11, 12.

<sup>77</sup> *Ibid* 19.

<sup>78</sup> Laksamana.net, *Quietly, Shangri-La Dispute Settled*, above n 55.

<sup>79</sup> Goodpaster, 'The Rule of Law, Economic Development and Indonesia', above n 69, 28.

<sup>80</sup> Sean Cooney et al, 'Labour Law and Labour Market Regulation in East Asian States: Problems and Issues for Comparative Inquiry' in Sean Cooney et al (eds), *Law and Labour Market Regulation in East Asia* (2002) 1, 7. See Howard Dick, 'Corruption and Good Governance: The New Frontier of Social Engineering' in Lindsey and Dick, *Corruption in Asia*, above n 63, 82, who notes that under the New Order regime, institutions that were inconsistent with the authoritarian structure of the state (such as trade unions and the legal system) were suppressed, corrupted or coopted.

<sup>81</sup> Goodpaster, 'The Rule of Law, Economic Development and Indonesia', above n 69, 28–9.

<sup>82</sup> Mattei, above n 67.

<sup>83</sup> See Colin Fenwick, Tim Lindsey and Luke Arnold, *Labour Dispute Settlement Reform in Indonesia: A Guide to the Policy and Legal Issues Raised by the Industrial Disputes Settlement Bill* (2002) 7. See also 'Govt Policies Blamed for Labor Disputes', *The Jakarta Post* (Jakarta, Indonesia), 19 April 2001, 5.

as wages, work hours, sick leave, maternity leave, holiday pay, overtime, and severance pay.<sup>84</sup> Indonesia is also the first Asian country to have ratified all eight of the ILO's core labour conventions.<sup>85</sup> To the ILO, this is a 'logical and encouraging sign that the Indonesian democracy wishes to continue on a firm route towards effective implementation of fundamental principles and rights at work'.<sup>86</sup>

However, the current route being followed is concerning. The text of labour laws is worthless without successful enforcement. Despite recent industrial relations reforms, the Indonesian labour law system continues to benefit workers only on an occasional and arbitrary basis.<sup>87</sup> New labour law reforms are weakly embedded as they reserve discretion in the hands of employers and the state.<sup>88</sup> Indonesia is claimed to have a 'culture of corruption' that has persisted over generations.<sup>89</sup> This is a problem for RLS, as sanctions are useless where collusion between corporations and the state has been institutionalised and tacitly approved.<sup>90</sup> Police protection is provided to those who can afford it. Employers, as opposed to workers, are able to obtain security and freedom for their operations.<sup>91</sup> The incidence of corruption is such that workers have little choice but to become complicit in the system. In 'political law' countries like Indonesia, the absence of rule-based decision-making means that people are not as inclined to rely on their legal rights against the state.<sup>92</sup> The dangers of trusting hollow new laws and institutions signify that for Indonesian workers, it is often safer to simply conform to the informal system in operation.<sup>93</sup>

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<sup>84</sup> See, eg, *Act 21 Concerning Trade Union/Labour Union 2000* (Indonesia); *Minimum Wages Act 1999* (Indonesia); *Settlement of Labour Dismissal and the Stipulation of Severance Pay, Gratuity and Compensation in Companies 2000* (Indonesia); *Conditions of Health, Cleanliness and Lighting in Workplaces Regulation No 7 1964* (Indonesia); *Basis for the Calculation of Overtime Wages 1984* (Indonesia); *Insurance against Sickness, Pregnancy and Confinement for Employees and their Relatives Regulations 1984* (Indonesia).

<sup>85</sup> Of the eight core conventions (see above n 9), Australia has not ratified the *Minimum Age Convention*, above n 9, and the *Worst Forms of Child Labour Convention*, above n 9.

<sup>86</sup> Kari Tapiola, ILO Regional Office for Asia and the Pacific, *Indonesia's President Wahid Joins ILO Battle against Child Labour* (2000) <[www.ilo.org/public/english/region/asro/bangkok/newsroom/pr0004.htm](http://www.ilo.org/public/english/region/asro/bangkok/newsroom/pr0004.htm)> at 1 May 2004.

<sup>87</sup> Lindsey and Masduki, 'Labour Law in Indonesia after Suharto', above n 71, 28.

<sup>88</sup> *Ibid.*

<sup>89</sup> Mohammad Hatta, quoted in Goodpaster, 'Reflections on Corruption in Indonesia', above n 63, 87.

<sup>90</sup> Lindsey and Masduki, 'Labour Law in Indonesia after Suharto', above n 71, 43.

<sup>91</sup> Goodpaster, 'Reflections on Corruption in Indonesia', above n 63, 97.

<sup>92</sup> Mattei, above n 67, 28–9.

<sup>93</sup> Lindsey and Masduki, 'Labour Law in Indonesia after Suharto', above n 71, 49. See Ian Fehring, 'Unionism and Workers' Rights in Indonesia — The Future' in Lindsey, *Indonesia: Law and Society* (1999) 367, 375; Lindsey, 'History Always Repeats', above n 70, 16. The beating, rape and murder of Marsinah, a labour activist, in 1993 is a potent reminder for Indonesians of the potential consequences of opposing corruption. Marsinah was employed in a watchmaking factory in East Java. She was involved in a strike at the factory over wage increases in May 1993. Thirteen workers were summonsed to report to the district military command on 4 May 1993, and were required to sign letters of resignation from the factory. Marsinah attempted to prevent the dismissals taking effect and was last seen attempting to deliver a letter to company management protesting that the resignations had been forced by the military. Her body was found three days later. At the trial of those accused of her murder, an official of the Ministry of Labour stated that regardless of the formal industrial relations system, labour disputes in the region were

The ability to form trade unions is a necessary counter to the power of employers and the state. Yet unions in Indonesia — despite enjoying significant freedoms since the collapse of the New Order — face new and difficult challenges. The 1997 Asian economic crisis had a dramatic impact on the viability of many businesses; it also prompted the flight of foreign investors and mass unemployment.<sup>94</sup> Instability in Indonesia after the 2002 Bali bombings threatens a similar situation. The result is an extremely vulnerable labour force able to be mobilised to keep labour costs low and capable of instant replacement in the case of a strike or other such disruption.<sup>95</sup> Similarly, an export-oriented industrialisation strategy requires low labour costs in order to compete with other Asian states.<sup>96</sup> This produces a labour law framework designed to control unions and wage demands.<sup>97</sup> Despite the appearance of change in Indonesia since 1998, unions are unable to displace the entrenched traditions of government and business that render law reform nugatory.<sup>98</sup>

### C *The Case of the Shangri-La Jakarta Hotel Workers*

The case of the Shangri-La Jakarta Hotel workers is an example of the inequality of power suffered by employees at the hands of their employers, and the collusion and corruption that often emerges when conducting business in Indonesia. In November 2001, the ILO's Committee on Freedom of Association was called on to investigate alleged violations of the fundamental rights to freedom of association and the right to organise and bargain collectively.<sup>99</sup> The allegations concerned the large-scale dismissals of members of the Shangri-La Hotel Independent Workers' Union, *Serikat Pekerja Mandiri Shangri-La Jakarta* ('SPMS') following strike action by employees of the hotel. The case also considered claims of violent police intervention to break the strike, which led to the arrest and detention of approximately 20 unionists.<sup>100</sup>

#### 1 *Events at the Shangri-La Jakarta Hotel*

The dispute began in September 2000 when SPMS initiated negotiations with Hotel management over the terms of the Collective Labour Agreement ('CLA') that applied to Hotel employees. During the negotiations, the employees were represented by SPMS. SPMS is an affiliate of the Geneva-based International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco, and Allied Workers ('IUF'), which later presented a complaint to the ILO on behalf of SPMS. The negotiations centred around the establishment of a pension scheme,

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conducted through a secret network of the government, the military and employers, and that identical networks existed all across Indonesia.

<sup>94</sup> Aloysius Uwiyono, *Employer's Perspective of the Present Industrial Relations in the International Labour Organization* (2000) [3] <<http://www.ilo.org/public/english/region/astro/jakarta/download/reference.pdf>> at 1 May 2004.

<sup>95</sup> Lindsey and Masduki, 'Labour Law in Indonesia after Suharto', above n 71, 42.

<sup>96</sup> *Ibid* 39.

<sup>97</sup> Cooney et al, 'Labour Law and Labour Market Regulation in East Asian States', above n 80, 6.

<sup>98</sup> Lindsey and Masduki, 'Labour Law in Indonesia after Suharto', above n 71, 31.

<sup>99</sup> Committee on Freedom of Association, International Labour Organization, *Indonesia (Case No 2116) Report*, ILO Doc 326 (2001) ('*Report No 326*').

<sup>100</sup> *Ibid* [354].

the granting of an annual indemnity and the equitable distribution of a percentage of gratuities.<sup>101</sup>

In a union meeting on 8 December 2000, Mr Halilintar Nurdin, President of SPMS, allegedly made ‘humiliating’ statements about the General Manager of the Shangri-La Hotel and his secretary.<sup>102</sup> On 22 December 2000, Hotel management suspended Nurdin because of alleged serious violations of the CLA. These violations included ‘provoking other employees to strike by putting up an intimidating poster’; ‘humiliating the general manager and his secretary through his statement of 8 December 2000’; and ‘carrying out disturbing acts that created a sense of dissatisfaction and distrust among employees of the hotel and disturbed industrial peace’.<sup>103</sup> Article 18 of the *Department of Labour Regulation No 150/Men/2000 on Termination of Employment* provides that grounds for terminating employment include ‘abusing, threatening (mentally or physically) or unduly humiliating the employer, the employer’s family, or fellow employees’.<sup>104</sup>

The employees met in the lobby of the Shangri-La Hotel to sign a petition protesting Nurdin’s suspension.<sup>105</sup> The Indonesian Government claimed that about 500 workers affiliated with SPMS went on strike and demonstrated at the Hotel. The Government asserted that the protesters occupied areas of the Hotel, closed all entrances, and searched people coming in and going out.<sup>106</sup> At 4pm, Hotel management transferred the guests to other hotels in Jakarta. At 6pm, management declared the Hotel closed.<sup>107</sup> The Government maintained that management closed the Hotel because of the actions of the ‘striking’ employees.<sup>108</sup> The union disputed this allegation, arguing that the workers were not on strike but rather were protesting Nurdin’s removal — it was Hotel management that locked the workers out and decided to cease Hotel operations.<sup>109</sup>

The union claimed that on 26 December 2000, approximately 350 members of the police force attacked the workers still protesting in the lobby, and removed them at the request of Hotel management.<sup>110</sup> Around 20 unionists were taken to the central Jakarta police station where they were detained for a day. The Government maintained that this was ‘merely to obtain information on the chronology of the suspected criminal action in the hotel’.<sup>111</sup>

In early January 2001, Shangri-La management sent approximately 400 SPMS members a letter stating that their participation in the strike would result in termination of their employment unless they were prepared to resign from the

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<sup>101</sup> Ibid [325].

<sup>102</sup> Ibid [344].

<sup>103</sup> Ibid [346].

<sup>104</sup> The Indonesian title of the Regulation is *Keputusan Menteri Tenaga Kerja Nomor Kep-150/Men/2000*.

<sup>105</sup> *Report No 326*, above n 99, [327].

<sup>106</sup> Ibid [347].

<sup>107</sup> Ibid [327].

<sup>108</sup> Ibid [347].

<sup>109</sup> Ibid [339].

<sup>110</sup> *Report No 326*, above n 99, [328].

<sup>111</sup> Ibid [349].

union.<sup>112</sup> The employees continued their protest. On 20 February 2001, Muhammed Zulrahman, treasurer of the union and a Shangri-La employee, was hospitalised after allegedly being attacked by a Hotel bodyguard.<sup>113</sup> On the same day, the Governor of Jakarta, Mr Sutiyosa, announced that he would provide the Hotel with 'special security forces in the event that management succeeded in reopening the hotel with non-striking workers'.<sup>114</sup> The Hotel reopened on 17 March 2001 with a non-union workforce.

## 2 *Legal Intervention in the Dispute*

The issue of the workers' dismissal was heard before the Central Committee for the Settlement of Labour Disputes, *Panitia Penyelesaian Perselisihan Perburuhan Pusat* ('P4P'). The P4P held that the strike was illegal because it was conducted without prior notification to the competent authority — the District Office of the Department of Labour.<sup>115</sup> As the strike was illegal, Hotel management had the right to dismiss the employees. However, the P4P did not consider that the offences were serious, therefore entitling the employees to severance pay.<sup>116</sup> All but 79 of the sacked employees accepted this ruling and settled with the Hotel. The 79 remaining employees lodged an appeal with the State Administrative Court, *Pengadilan Tinggi Tata Usaha Negara*.<sup>117</sup> The appeal succeeded, with the Court ruling that the mass dismissal of SPMS workers was illegal. The Court ordered the reinstatement of the 79 workers.<sup>118</sup> Following the decision, both the Hotel owners and the P4P lodged separate appeals to the highest court in Indonesia, the Supreme Court, *Mahkamah Agung*.<sup>119</sup>

Shangri-La management also commenced a civil suit seeking damages of approximately IDR80 billion (US\$8 million) from SPMS organisers and the Indonesian representative of the IUF. On 1 November 2001, the South Jakarta State Court, *Pengadilan Negeri Jakarta Selatan*, ordered six union officials to pay IDR20.7 billion (US\$2.34 million) in compensation for damage to reputation, damage to Hotel facilities and losses suffered due to the closure of the Hotel. The Court also ordered the defendants to publish written apologies to Hotel management in five national newspapers.<sup>120</sup> The defendants appealed the decision to the High Court of Jakarta, *Pengadilan Tinggi DKI Jakarta*. On 27 August 2002, the appeal was rejected on procedural grounds.<sup>121</sup>

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<sup>112</sup> Ibid [329].

<sup>113</sup> Ibid [330].

<sup>114</sup> Ibid.

<sup>115</sup> Committee on Freedom of Association, International Labour Office Governing Body, International Labour Organization, *Indonesia (Case No 2116) Report*, ILO Doc 328 (2001) [341] ('*Report No 328*').

<sup>116</sup> *Report No 326*, above n 99, [352].

<sup>117</sup> *Report No 328*, above n 115, [360].

<sup>118</sup> Ibid.

<sup>119</sup> Ibid [336].

<sup>120</sup> Fenwick, Lindsey and Arnold, above n 83, 21.

<sup>121</sup> IUF, 'Justice Denied (Again) in Indonesia: High Court Orders Shangri-La Workers to Pay US\$2.34 Million for Owners' Union Busting', (2002) <<http://www.labournet.net/world/0209/indones1.html>> at 1 May 2004.

### 3 *Examination of the Case by the ILO*

In communications that commenced on 23 February 2001, the IUF submitted to the ILO a complaint of violations of freedom of association against the Indonesian Government. The first report of the Committee on Freedom of Association ('the Committee') found that 580 SPMS members were dismissed for their involvement in strike action, despite no evidence indicating that the strike was illegal.<sup>122</sup> The Committee alerted the Indonesian Government to the principle that 'the dismissal of a worker because of a strike, which is a legitimate trade union activity, constitutes serious discrimination in employment and is contrary to Convention No. 98'.<sup>123</sup> The Committee also reminded the Government that the arrest and detention of trade union leaders and trade unionists for exercising legitimate trade union activities constitutes a violation of the principles of freedom of association.<sup>124</sup>

In *Report No 328*, the Committee commented on the civil suit and the award for compensation granted against the union members. The Committee recalled that

it has always recognised the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests ... [T]he imposition of penalties for economic losses that might be linked to strike action and/or peaceful protest action constitutes a serious restriction of the right to strike ...<sup>125</sup>

The Committee requested that the Government take the necessary steps to ensure that allegations of union-busting tactics on the part of the Hotel, particularly in relation to the conditioning of re-employment on resignation from the union, be thoroughly investigated. If these allegations proved correct, the Committee requested that the Government remedy any effects of such anti-union discrimination for the workers.<sup>126</sup> The Committee also requested that the Government take the necessary measures to avoid recourse to excessive police interference in respect of the exercise of legitimate trade union activity.

In April 2003, the Shangri-La dispute was settled in the Supreme Court. While none of the 79 employees were reinstated, the settlement was said to include a payout for each worth around four years' basic pay.<sup>127</sup> The Hotel also agreed to drop the civil suit for damages. Following the settlement, the secretary of SPMS, Eddi Hudyanto, said that '[t]he existing institutions in Indonesia, the dispute resolution mechanism and industrial relations were useless'.<sup>128</sup> The power of employers and their apparent cooperation with institutions like the police and local government is in stark contrast to the vulnerability of employees. Though Indonesia is not a regulatory void, the Shangri-La case demonstrates that access to justice is inadequate. This article now questions whether RLS provides an effective alternative.

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<sup>122</sup> *Report No 326*, above n 99, [356].

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid* [362].

<sup>125</sup> *Report No 328*, above n 115, [368].

<sup>126</sup> *Ibid* [370].

<sup>127</sup> Laksamana.net, *Quietly, Shangri-La Dispute Settled*, above n 55.

<sup>128</sup> *Ibid.*

## IV TESTING THE RLS PROPOSAL

The case of the Shangri-La workers and an understanding of labour regulation in Indonesia questions the overall viability of RLS. The examination of the actions of the workers, consumers, management and the State set out in Part III of this article provides an opportunity to substantiate some of the criticisms levelled at the theory, and to refute others.

A *Application of RLS to Service Sector Workers*

The primary issue is whether the RLS theory is applicable to service sector workers, such as the Shangri-La employees. Fung, O'Rourke and Sabel are alert to the problematic scope of application of their theory. They ask:

Is the approach only appropriate for multinational companies who sell to consumers in rich countries? Or can it also apply to commodity producers or those who sell primarily to domestic markets in developing countries?<sup>129</sup>

The authors must examine whether their theory is capable of application in sectors other than those that produce goods. The RLS proposal fails to adequately consider service sector workers. The concern noted by Fung, O'Rourke and Sabel above is that commodity markets and purely domestic markets may lack ethically inclined consumers, hence losing a fundamental element of RLS. Of equal concern, however, is whether ethical consumerism extends to the provision of services as well as the production of goods.

1 *Concern for All Workers?*

Although the RLS theory should be capable of universal application, it is questionable whether *all* workers stand to benefit from it. The primary focus of the RLS proposal is the MNC producing goods in developing countries for consumption in developed ones.<sup>130</sup> It seems, then, that forms of work beyond the factory are not encompassed by RLS.<sup>131</sup> This has been labelled a 'factory vision' of labour regulation.<sup>132</sup> It gives rise to the perception that the only labour abuses that merit the protection of RLS are those that occur in factories. In fact, examples of labour rights violations in factories dominate the proposal to the extent that a reader would be forgiven for thinking that abuses only occur in sweatshops. Yet sweatshop labour practices — which commonly include unliveable wages, unreasonable hours, unsafe working conditions, and physical and mental abuse by supervisors — undoubtedly exist in other sectors.<sup>133</sup>

Therefore, it is unclear why RLS concentrates on factories to the exclusion of other sectors. Perhaps Fung, O'Rourke and Sabel believe that the worst

<sup>129</sup> Fung, O'Rourke and Sabel, 'Realizing Labor Standards', above n 3, 20.

<sup>130</sup> Murray, above n 6, 316–17.

<sup>131</sup> *Ibid* 331.

<sup>132</sup> Richard Mitchell, 'Introduction: A New Scope and a New Task for Labour Law?' in Richard Mitchell (ed), *Redefining Labour Law: New Perspectives on the Future of Teaching and Research* (1995) xii.

<sup>133</sup> Lena Ayoub, 'Nike Just Does It — and Why the United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for their Labor Rights Violations Abroad' (1999) 11 *DePaul Business Law Journal* 395, 397.

violations of labour rights occur in sweatshops.<sup>134</sup> Or perhaps the factory setting is simply the least complicated illustration of how the RLS principles could succeed, given the public concern that already exists for sweatshop workers. More cynically, some have argued that although campaigns against MNCs are centred on improving factory conditions, the real agenda is to repatriate the work to the developed state rather than protect against 'sweatshop' conditions.<sup>135</sup> On this thesis, the public in developed countries would be less concerned about service sector jobs because these cannot usually be performed locally.<sup>136</sup> This is an extreme interpretation of RLS made possible by the limited view of labour that RLS presents. The 'factory vision' of labour regulation is one of the factors that militate against the universal application of RLS.

## 2 *The Dynamics of Consumer Concern*

The primary relationship in RLS is between the corporation and the consumer, as opposed to the traditional labour law focus on employers and employees. It is the product that links these two key actors. RLS concentrates on the production and sale of goods rather than the worker, with the result that labour conditions are treated in the same way as other production processes.<sup>137</sup> A fundamental principle of the ILO is that 'labour is not a commodity'.<sup>138</sup> Yet under RLS, workers are reduced to a factor of production. Labour standards would be implemented to ensure the smooth flow of production and the maximisation of profits.<sup>139</sup> In this way, RLS entrusts the prioritisation of workers' needs to firms in response to consumer demands. Developed country consumers would dictate the types of labour rights that should be protected around the world. Whether the scope of application of RLS extends to service sector workers thus depends solely on the dynamics of consumer concern.

The 'factory vision' of labour is such that even if sweatshop conditions are found in service industries, the predominant image in RLS remains that of the factory. Fung, O'Rourke and Sabel contend that there is public concern for the welfare of distant workers.<sup>140</sup> Yet the examples found in the proposal are only of consumers reacting to information about sweatshop conditions.<sup>141</sup> Although the authors do not explicitly distinguish between different industries, the proposal seems only to recognise the plight of factory workers. While there is

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<sup>134</sup> Many argue that conditions in factories producing goods for MNCs are often far better than conditions in locally owned businesses. See Bardhan, above n 6, 2; Michael Cave, 'Nike Claims Clean Slate On Rights', *Australian Financial Review* (Sydney, Australia), 18 May 2002, 3; Rowan Callick, 'Sweatshops as Steps In Right Direction', *Australian Financial Review* (Sydney, Australia), 3 August 2002, 20.

<sup>135</sup> Callick, above n 134.

<sup>136</sup> Note, though, the use of offshore call centres as an example of a service industry which has been relocated from developed to developing countries.

<sup>137</sup> Blackett, above n 6, 418.

<sup>138</sup> International Labour Organization, *Constitution of the International Labour Organization*, annex (*Declaration concerning the Aims and Purposes of the International Labour Organization*) (10 May 1944), art 2 ('*Philadelphia Declaration*'). Braithwaite and Drahos, above n 12, 230, 246, indicate that the deregulation debate of the 1990s has obliterated this founding principle of the ILO.

<sup>139</sup> Blackett, above n 6, 417.

<sup>140</sup> Fung, O'Rourke and Sabel, 'Realizing Labor Standards', above n 3, 7.

<sup>141</sup> *Ibid* 7–8.

considerable research into the labour practices of factories in developing countries,<sup>142</sup> the position of service sector workers is less familiar. Because consumer action depends on knowledge, the range of images portrayed in developed countries impacts greatly on the scope of application of RLS.

There is a real danger that aggressive marketing campaigns and the media, which control the images exposed to consumers, will only present part of the story.<sup>143</sup> Liubicic states that media and academic coverage reveal two dominant areas of concern: child labour and sweatshops.<sup>144</sup> This is problematic for service sector workers. Their physical working conditions often do not evoke the type of response generated by images of a sweatshop or a child at work. Conditions in a five-star hotel cannot be compared to those in a factory. Only poignant images of labour abuses are portrayed in the media,<sup>145</sup> ignoring violations of labour rights that lack emotive appeal.

Child labourers and sweatshop workers present a picture of vulnerability. The abuse of labour rights is clear and obvious, and the helplessness of the victims is acute. A violation of the right to freedom of association, however, is difficult to represent visually. Far from being vulnerable, images of workers on strike fighting for this right appear strident, perhaps even aggressive. The problem for workers such as those at the Shangri-La Hotel is twofold. Firstly, their apparently luxurious working surrounds, coupled with the difficulty of portraying an abuse of freedom of association, may fail to attract the attention and consequent support of consumers. Secondly, workers must then strike or protest in order to attract media attention. Yet this gives the workers a semblance of power and control that is far from the image of a helpless worker needing the assistance of distant consumers. As a result, the image of a striking hotel worker may not lie as heavily on the conscience of a consumer in a developed country as does the portrayal of a sweatshop worker making the footwear they buy.

### 3 Ethical Consumerism and the Services Sector

The question is whether the concept of ethical consumerism relied on by Fung, O'Rourke and Sabel is the same when the product consumed is a trip to

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<sup>142</sup> See, eg, Ayoub, above n 133; Heidi Bloomfield, "Sweating" the International Garment Industry: A Critique of the Presidential Task Force's Workplace Codes of Conduct and Monitoring System' (1999) 22 *Hastings International and Comparative Law Review* 567; Clare Duffield, 'Multinational Corporations and Workers' Rights' in Stuart Rees and Shelley Wright (eds), *Human Rights, Corporate Responsibility: A Dialogue* (2000) 191; Cecilia Green, 'At the Junction of the Global and the Local: Transnational Industry and Women Workers in the Caribbean' in Lance Compa and Stephen Diamond (eds), *Human Rights, Labor Rights, and International Trade* (1996) 118; Laura Ho, Catherine Powell and Leti Volpp, '(Dis)assembling Rights of Women Workers along the Global Assembly Line: Human Rights and the Garment Industry' (1996) 31 *Harvard Civil Rights — Civil Liberties Law Review* 383; Ryan Toftoy, 'Now Playing: Corporate Codes of Conduct in the Global Theater — Is Nike Just Doing It?' (1998) 15 *Arizona Journal of International and Comparative Law* 905; Karl Schoenberger, *Levi's Children: Coming to Terms with Human Rights in the Global Marketplace* (2000).

<sup>143</sup> Claire Dickerson, 'Transnational Codes of Conduct through Dialogue: Leveling the Playing Field for Developing-Country Workers' (2001) 53 *Florida Law Review* 611, 651.

<sup>144</sup> Robert Liubicic, 'Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives' (1998) 30 *Law and Policy in International Business* 111, 142.

<sup>145</sup> Blackett, above n 6, 431.

Indonesia rather than a pair of running shoes. It is possible to view the hotel as the factory, and the rooms and various services provided as the 'good' produced by these employees. The Shangri-La Hotel has an identifiable image and a reputation worth protecting. The consumers of Shangri-La Hotel 'products' include international visitors from developed countries. With these key ingredients of RLS present, the theory could potentially apply beyond the factory without modification.

The Shangri-La Hotel case generated much international attention. This was in large part due to the status of SPMS as an affiliate of the IUF. The IUF expresses similar sentiments to Fung, O'Rourke and Sabel. The IUF believes that

transnational corporations cannot divorce their activities in one country from their activities in another. A company that victimises workers and treats them with impunity in one country, cannot expect such practices to be ignored internationally.<sup>146</sup>

IUF affiliates in Australia, New Zealand, America, Canada and Europe staged numerous rallies at Indonesian consulates and Shangri-La Hotel sales offices to show their support for the sacked union members in Indonesia.<sup>147</sup> This was in addition to the continuing protests outside the Hotel in Jakarta. In RLS terminology, these public demonstrations were staged with a view to ensuring transparency and greater public awareness of working conditions at the Hotel.

The publicity and information generated by such union activity enabled potential customers of the Shangri-La Hotel to decide, on the basis of labour conditions, whether they would continue to patronise the Hotel. The union was thus acting as a type of monitor — a role envisaged by Fung, O'Rourke and Sabel.<sup>148</sup> The Shangri-La Hotel now competes with other luxury hotels in Jakarta according to the treatment of its workers. Arguably, this competition affects the entire Shangri-La chain.

Furthermore, union protests in support of the Shangri-La workers affected another facet of the Shangri-La Hotel 'production chain'. In 2001, the Victorian Government received bids for the Docklands redevelopment. The A\$1.8 billion contract was awarded to Australian builders Lend Lease over the other short-listed contender, Market City Properties ('MCP'), a subsidiary of Robert Kuok's Kuok Group.<sup>149</sup> The Kuok Group's transnational corporation Shangri-La Asia also partly owns the Shangri-La Jakarta Hotel. The President of the Australian Council of Trade Unions ('ACTU'), Sharan Burrow, wrote to the Victorian Premier informing him of the events at the Shangri-La Hotel in Jakarta. Victoria's building unions also threatened to ban all work on the Kuok

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<sup>146</sup> Ma Wei Pin and Jasper Goss, IUF Asia and Pacific, *The Docklands and Global Labour* (2001) <[http://workers.labor.net.au/92/c\\_historicalfeature\\_docks.html](http://workers.labor.net.au/92/c_historicalfeature_docks.html)> at 1 May 2004.

<sup>147</sup> See, eg, Liquor, Hospitality and Miscellaneous Workers' Union, *Hotel Workers Protest Multi-Billionaire's Hotel Investments* (2002) <<http://www.lhmu.org.au/lhmu/news/706.html>> at 1 May 2004; Asianfoodworker.net, *New York, Toronto and Sydney: Campaign for Shangri-La Workers Spreads* (2001) [5] <[www.asianfoodworker.net/afw-pdf/2001/AFW01-4.pdf](http://www.asianfoodworker.net/afw-pdf/2001/AFW01-4.pdf)> at 1 May 2004; New Zealand Council of Trade Unions, *Fight against Union-Busting Shangri-La* (2002) <<http://www.union.org.nz/news/21.html>> at 1 May 2004.

<sup>148</sup> Fung, O'Rourke and Sabel, 'Realizing Labor Standards', above n 3, 18.

<sup>149</sup> Andrea Carson and Paul Robinson, 'Lend Lease to Build \$1.8 billion Jewel at Docklands', *The Age* (Melbourne, Australia), 12 April 2001, 6.

plan if the MCP group won the tender without settling the dispute in Jakarta.<sup>150</sup> The decision of the Docklands Authority not to award the development project to the Kuok Group was hailed as a victory for Victorian building workers and the ACTU, and undoubtedly for the Shangri-La workers as well.<sup>151</sup>

The Kuok Group also tendered for the Batman Hill precinct at the Docklands. The Victorian Premier again received a letter concerning the role of the Kuok Group in the Shangri-La dispute.<sup>152</sup> The Kuok Group was awarded the contract, though this occurred in May 2002 when the State Administrative Court in Indonesia had recently overturned the decision of the P4P, ordering that the Hotel workers be reinstated. The Kuok Group's successful tender prompted the ACTU President to warn the company about its dealings with unions on the Docklands project: 'We remain concerned about this group's attitude to working people, particularly given their failure to convince their Indonesian partners to respect freedom of association and the right to collectively bargain'.<sup>153</sup> Australian hospitality workers continued to protest in support of the Shangri-La workers up until August 2002, warning Kuok that he could not extend the Shangri-La Hotel chain to Australia and expect to treat Australian hotel workers as he treats them in Indonesia.<sup>154</sup>

The case of the Shangri-La workers illustrates that consumer concern can be agitated — here, by unions — to extend to issues other than simply conditions in factories, and also to the right to freedom of association. It seems that RLS could be applied by analogy to other kinds of production beyond the factory, such as services. It detracts from the theory, however, to be forced to constantly draw parallels between sectors not discussed in RLS and the factory. It is not necessary to view a hotel as a factory, and rooms and services as goods. RLS is capable of application without this process. RLS would benefit from adopting less exclusive language and examples. Fung, O'Rourke and Sabel must use cases like the Shangri-La Hotel to demonstrate that the scope of application of RLS is, in fact, broader than it initially appears.

### B *The Impact of Social and Market Pressures on Firms*

Having determined that informed consumers are concerned about the welfare of non-factory workers, it is necessary to examine whether the other key actor in RLS, the firm, responds in the manner anticipated by the authors. RLS requires the engagement of the firm in response to consumer demands. In theory, consumer loyalty is so crucial that firms, irrespective of whether they produce goods or offer services, would respond quickly to protests and seek to restore their damaged reputation. This presumption should apply more readily to service industries, as unlike the manufacturing sector, a hotel or similar business does not have the option of relocating to a country with more lax labour standards. In

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<sup>150</sup> Ma and Goss, above n 146, 2.

<sup>151</sup> Carson and Robinson, above n 149, 6.

<sup>152</sup> The letter was written by Greg Sword, the Regional President of the International Food Union and National Australian Labour Party President. See Paul Robinson, 'Edict Eases Docklands Tender Tension', *The Age* (Melbourne, Australia), 2 April 2002, 6.

<sup>153</sup> Sharan Burrow cited in William Birnbauer, 'Docklands Boosted by \$700m Development', *The Age* (Melbourne, Australia), 17 May 2002, 3.

<sup>154</sup> See Liquor, Hospitality and Miscellaneous Workers' Union, *Hotel Workers Protest Multi-Billionaire's Hotel Investments*, above n 147.

order to capture the market in a particular location, for example, hotel rooms in Jakarta, a firm must remain where it is and respond to criticism of its practices.

The concern is, however, that only certain firms are susceptible to influence from consumers in developed countries.<sup>155</sup> This is a broad fear that applies both to the production of goods and the provision of services. Fung, O'Rourke and Sabel state that 'consumer activism and corporate responses to it are still too narrowly focused on brand-sensitive firms'.<sup>156</sup> It is strange that the authors highlight this concern, yet then present a model for labour regulation using only examples of firms selling brand-name products in developed countries to support the theory. Given the recognisable Shangri-La name, the case does not permit an exploration of the potential application of RLS to purely domestic businesses or no-name goods or services. What emerges from the Shangri-La case is, however, more alarming than such an inquiry. For if, as the case reveals, even brand name firms do not respond in the manner anticipated by RLS, then it is surely futile to consider how domestic and no-name firms would respond.

On the RLS thesis, Shangri-La management should have responded to the social and competitive pressures arising from the protracted labour dispute with its workers. The Jakarta Hotel lost customers to competitors, and the Shangri-La chain failed to secure lucrative contracts. Management now faces a hostile and non-compliant workforce in Indonesia and beyond. As a corporation with an identifiable image and a valuable reputation, the Shangri-La Hotel should have acted to reverse the growing perception of the company as a perpetrator of labour rights violations.

Instead, Hotel management responded to union protests and consumer boycotts by prolonging the dispute through the courts. This poses a serious problem for RLS. Even if the Shangri-La Hotel adhered to the 'best practices' in Jakarta, the amount of negative publicity should have indicated that these practices were unacceptable and consumers were unwilling to use the Hotel's services until conditions ratcheted upwards. Irrespective of practices in other hotels, the social and market pressures should have been sufficient to compel the Hotel to initiate changes. However, not only did Shangri-La management not react in the manner predicted by the RLS thesis, it also refused to grant to workers the one right that Fung, O'Rourke and Sabel claim is essential to the theory.

### C *Freedom of Association under RLS*

Freedom of association is the most fundamental of workers' rights. Leary considers that the level of labour rights protection in a country is a solid indication of the status of human rights generally, and that a violation of freedom of association is the first sign of a deteriorating situation.<sup>157</sup> The traditional, protective view of labour law is that the state's role is to enact laws that rectify the power imbalance between employers and employees: 'the main object of labour law [is] to be a countervailing force to counteract the inequality of

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<sup>155</sup> Liubicic, above n 144, 114.

<sup>156</sup> Fung, O'Rourke and Sabel, 'Realizing Labor Standards', above n 3, 9.

<sup>157</sup> Leary, 'The Paradox of Workers' Rights as Human Rights', above n 2, 22.

bargaining power which is inherent and must be inherent in the employment relationship'.<sup>158</sup>

Freedom of association is crucial to this objective. Yet in RLS, the relationship between employer and employee is displaced by that of the corporation and consumer. It assigns the task of restraining corporate power to consumers. For workers, freedom of association must do more under RLS than rectify a power imbalance: it serves to place them in the equation from which they are otherwise absent.

Freedom of association is the one fixed principle that Fung, O'Rourke and Sabel acknowledge as implicit in their theory. The RLS authors argue that 'worker organizations will often prove to be effective monitors and innovators'.<sup>159</sup> They consider that trade unions 'have better access to information from workers on real factory conditions and have the expertise to propose remedies to the problems they uncover'.<sup>160</sup> Freedom of association would therefore be the key to connecting the knowledge and preferences of workers to the power of well-intentioned consumers. This is evidenced by the role of the union in the Shangri-La dispute. However, the Hotel's failure to respect freedom of association has wide ramifications for RLS.

RLS may recognise the right to freedom of association as essential, but it remains silent about the related right to collective bargaining. There are, in effect, different conceptions of the principle of freedom of association. Neo-liberal economic thinking has resulted in a tendency to decentralise and a consequent emphasis on the right of individuals to make their own choices regarding the conditions of their employment.<sup>161</sup> In this sense, freedom of association is considered simply as an individual right to either join, or more particularly, not join, a trade union. By contrast, the collectivist notion is that freedom of association is the means through which workers can join together to bargain for common goals.<sup>162</sup> The emphasis in ILO standard-setting instruments on collective bargaining to determine terms and conditions of employment arises from the traditional view of the worker as powerless vis-à-vis employers and the state.<sup>163</sup> Under RLS, the scope of the right is vague. Collective bargaining does not appear to figure in the theory, for it is not intended that workers would negotiate with employers. Consumers effectively bargain on behalf of employees through their purchasing choices. By not recognising the right to bargain collectively, RLS severely restricts the voice of workers.

Arguably, a firm might support the limited view of freedom of association espoused by RLS for the sake of good public relations. Guaranteeing the further

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<sup>158</sup> Paul Davies and Mark Freedland, *Kahn-Freud's Labour and the Law* (3<sup>rd</sup> ed, 1983) 18.

<sup>159</sup> Fung, O'Rourke and Sabel, 'Fung, O'Rourke, and Sabel Respond', above n 6, 4.

<sup>160</sup> Fung, O'Rourke and Sabel, 'Realizing Labor Standards', above n 3, 19.

<sup>161</sup> Roy Adams, 'Taking on Goliath: Industrial Relations and the Neo-Liberal Agenda' in Tom Wilthagen (ed), *Advancing Theory in Labour Law and Industrial Relations in a Global Context* (1998) 11, 11.

<sup>162</sup> Though freedom of association is generally expressed as an individual right, there have been interesting attempts in recent years to rely on the right as a means to combat various efforts of governments to reduce union protections under labour laws. However, most ultimate courts do not appear keen to extend the individual right to a collective implication, that is, the right to collective bargaining. See *Dunmore v Ontario (Attorney-General)* [2001] 3 SCR 1016; *Wilson v The United Kingdom* (2002) V Eur Court HR 49; 35 EHRR 20.

<sup>163</sup> Creighton, above n 12, 99.

right to bargain collectively, however, presents concerns for employers. The right to strike is an inherent corollary of the right to organise and bargain.<sup>164</sup> Engels argues that without the threat of strike action, ‘the right to bargain collectively will become the right to beg collectively’.<sup>165</sup> The aim of a strike is to ‘demonstrate the potential of labour to inflict economic harm’.<sup>166</sup> In this sense it can be compared to the effect of a consumer boycott — surely a useful addition to RLS. The right to strike provides an additional mechanism to influence firms to ratchet labour standards upwards, and alleviates some of the concern about the need for ethically inclined consumers in all sectors. Yet RLS remains silent on the issue, perhaps because this is a right never to be agreed to by the corporations at the centre of the theory.<sup>167</sup> Without the right to strike, workers under RLS would have the right to beg collectively to consumers in developed countries in the hope that they adopt their cause.

Irrespective of the scope of the principle of freedom of association, the right of workers to form trade unions remains essential to the effective implementation of RLS. The question, then, is how it could be secured in practice. Fung, O’Rourke and Sabel argue that unions could ‘use RLS to press governments and corporations to respect the freedoms that workers require to collectively understand and improve their workplaces’.<sup>168</sup> They claim that a ‘central aim of RLS is to devise methods to increase space for free association’,<sup>169</sup> though they are imprecise about how this would occur in practice. As Murray points out, ‘[i]f fixed rules and uniform standards, and the regulatory agencies charged with their attainment and protection, are rejected or ignored, how is freedom of association to be defined and attained in the brave new world of RLS?’<sup>170</sup>

That unions are to ‘press governments’ to respect the right to freedom of association does not accord with the RLS assessment of states as ineffective regulatory agencies. Although the Indonesian Government has ratified both ILO conventions on freedom of association and collective bargaining, securing these rights in practice remains elusive for most Indonesian workers.

If the state is unable or unwilling to respect freedom of association, the proposed alternative is to use RLS to press corporations to guarantee the right. In corporate codes of conduct — where firms are left to determine the scope of protected rights — freedom of association and collective bargaining are rarely mentioned.<sup>171</sup> Some codes require companies to respect local law and practice,

<sup>164</sup> International Labour Office, ‘Freedom of Association and Collective Bargaining’ (Paper presented at the International Labor Conference, Geneva, 1994) [77]–[78].

<sup>165</sup> Chris Engels, ‘Codes of Conduct: Freedom of Association and the Right to Bargain Collectively’ in Roger Blanpain (ed), *Multinational Enterprises and the Social Challenges of the XXI<sup>st</sup> Century* (2000) 212.

<sup>166</sup> Paul Germanotta and Tonia Novitz, ‘Globalisation and the Right to Strike: The Case for European-Level Protection of Secondary Action’ (2002) 18 *International Journal of Comparative Labour Law and Industrial Relations* 67, 68. For a report of the economic damage caused by the Shangri-La dispute see: ‘Shangri-La has Lost Rp18b from Strike’, *The Jakarta Post* (Jakarta, Indonesia) 24 September 2002.

<sup>167</sup> Engels, above n 165, 231.

<sup>168</sup> Fung, O’Rourke and Sabel, ‘Realizing Labor Standards’, above n 3, 19.

<sup>169</sup> Fung, O’Rourke and Sabel, ‘Fung, O’Rourke, and Sabel Respond’, above n 6, 4.

<sup>170</sup> Murray, above n 6, 326.

<sup>171</sup> Engels, above n 165, 219.

or they refer to the principles contained in ILO conventions.<sup>172</sup> As the reality of labour regulation in Indonesia reveals, addressing the issue in this way affords no real protection to workers. Other codes, such as the *Social Accountability 8000*, provide that where state law restricts the right to freedom of association and collective bargaining, the company shall facilitate parallel means of implementing these rights.<sup>173</sup> It is uncertain how meaningful protection could occur without an enabling state regulatory framework. Moreover, it is questionable whether a corporation even has the motivation to respect and recognise the right. If corporations could realistically be expected to guarantee freedom of association voluntarily, then RLS would surely leave its implementation to the ratcheting system.

Freedom of association goes to the core of the power relationship between management and workers.<sup>174</sup> It is supposedly in a firm's interest to promote good labour practices in order to attract consumer loyalty and increase profits. But it is unlikely to be in a firm's interest to guarantee the right to freedom of association. Under RLS, '[s]ocial and market pressures would push firms ... to constantly develop new methods of improving occupational health and safety, labor-management practices, and the like'.<sup>175</sup> The Shangri-La Hotel case illustrates that no amount of social or market pressures were sufficient to compel the Hotel to respect freedom of association. In fact, management went to great lengths to secure their power and control over workers, and other hotels in Jakarta allegedly supported the Shangri-La Hotel throughout the dispute in the belief that maintaining a hardline against the employees would also benefit them in the future.<sup>176</sup> As Levinson argues, firms will act to avoid being perceived as a sweatshop producer, but they will not risk losing control over workers by granting the basic right to organise.<sup>177</sup>

## V CONCLUSION

Fung, O'Rourke and Sabel state that RLS is 'speculative and incomplete in its formulation'.<sup>178</sup> They have attempted to create a more effective method of labour regulation. Crucially, however, the RLS proposal fails to consider what impact the domestic context might have on the theory. It is difficult to imagine that the situation presented in this article is unique to Indonesia or the Shangri-La Hotel. That the State was ineffective in securing the right to freedom of association is neither surprising, nor necessarily damaging to the RLS theory. What is striking is the fact that the company did not respond to negative publicity in the manner anticipated by RLS.

RLS places sole responsibility for the protection and promotion of labour rights on firms in response to consumer demands. If a business refuses to improve its labour practices in the face of criticism from the public, the entire

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<sup>172</sup> Ibid 220.

<sup>173</sup> Social Accountability International, *Social Accountability 8000* (1996) [4.2].

<sup>174</sup> Engels, above n 165, 230.

<sup>175</sup> Fung, O'Rourke and Sabel, 'Realizing Labor Standards', above n 3, 11.

<sup>176</sup> Laksamana.net, *Shangri-La Case Goes to Supreme Court* (2000) <[http://www.laksamana.net/vnews.cfm?news\\_id=2352](http://www.laksamana.net/vnews.cfm?news_id=2352)> at 1 May 2004.

<sup>177</sup> Levinson, above n 6, 1–2.

<sup>178</sup> Fung, O'Rourke and Sabel, 'Fung, O'Rourke, and Sabel Respond', above n 6, 4.

basis of RLS is challenged. It is possible that the response of Shangri-La management was particular to the right being sought by the employees. There is considerable evidence of MNCs responding to demands to improve sweatshop conditions. Yet if the RLS system is unable to secure the fundamental right to freedom of association, it must fail as an effective alternative system of international labour regulation.

RLS leans too heavily in favour of the corporation — it removes the worker from the basic traditional equation in labour regulation. It will never be in a corporation's interest to promote actively the right to freedom of association, and especially not the associated rights to bargain collectively and to strike. It is, however, in the interests of RLS to recognise the full gamut of rights that flow from the principle of freedom of association. These rights would serve as an additional mechanism to ratchet-up standards. They would also extend to workers a position in this new regulatory system that is currently lacking. There must be more emphasis on the voice of workers and less reliance on goods as tools for workplace change.