Using Open-Ended Standards to Advance Labour Law’s Goals

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CRIMT conference
Montreal, May 14, 2014
The Crisis of Labour Law

• A crisis of means, not goals
• Mismatch between goals and means
• Two main manifestations of the crisis:
  – Coverage problem (many workers in need of protection are not protected)
    • Fundamental concepts require updating
    • Problems of enforcement
  – Obsoleteness problem (labour laws have not been sufficiently updated to adapt to new realities)
The Crisis of Labour Law

• Problems of enforcement and obsoleteness have been exacerbated by the decline of unions
  – Historically played an important role in ensuring compliance with labour laws
  – Collective agreements have previously been the main method for adapting the law to new circumstances/challenges
The Crisis of Labour Law

• When labour laws do not apply (not enforced or not updated)
  – Employers enjoy more power
  – The goals of labour law are frustrated (including in terms of “citizenship at work”)
  – The result is especially problematic for workers who are most vulnerable

• The current paper examines one possible solution (among many): using open-ended standards
Standards In Labour Law

• Standards commonly used in labour/employment law in different systems:
  – Good faith (or “mutual trust and confidence”)
  – Proportionality
  – Reasonableness
  – Fairness
  – Managerial prerogative
Standards in Labour Law

• In recent years the use of such standards has increased in many countries
• Is it justified? Should we do it even more?
• My tentative conclusion: Yes (not instead of rules, but as a supplement to them)
• The paper shows why this can be useful in theory, and then how it has been useful in practice
Rules vs. Standards

• Rules: specific commands (driving at a speed of over 50km/h is prohibited)
• Standards: open-ended, require more discretion to apply (driving at a dangerous speed is prohibited)
• A spectrum rather than a clear cut distinction
• Each method has its own advantages; every legal system has a combination of both
Rules vs. Standards

• Rules: clarity, consistency, predictability, easier to enforce

• But only if the undesirable activity can be defined in a precise manner; otherwise problems of over-inclusion and under-inclusion

• Especially in labour relations (long term, complex, ever-changing) it is impossible to foresee every contingency
Rules vs. Standards

• Rules are also harmful to intrinsic motivation; standards are less destructive for “good” employers with ethical motives
• Standards can have a chilling effect (over-deter)
• But they can cover unforeseen situations; good for heterogeneous conduct
• Standards can accommodate change; if the desirable solution changes over time/in new circumstances, no need to wait for the legislature
Rules vs. Standards

• Rules are associated with individualism and standards with altruism? (Duncan Kennedy 1976). If so, standards are better suited to achieve labour law’s redistributive goal

• Standards offer a solution to opportunism (taking advantage of imperfections in the law): “bright-line rules create incentives for exploitation in situations in which knowledge or access to information is distributed unequally” (Sullivan 1992)
Combining Rules with Standards

• Driving at a speed of more than 50km/h or at a dangerous speed is prohibited

• Minimizes the problem of under-inclusion

• Diminishes to some extent the advantages of the rule; less determinacy etc. (Ehrlich and Posner 1974)

• But a prudent mix of rules and standards can achieve the highest level of certainty (Braithwaite 2002)
Combining Rules with Standards

• When a standard is used as a supplement to rules (for example, employers must act in good faith on top of their specific duties set in employment legislation):
  – Could be useful to address problems of enforcement (more difficult to evade)
  – Allows room for adapting the law
Combining Rules with Standards

• So there is potential, but there are also risks:
  – If both parties are subject to the standard, could be used by judges to impose more duties only on employees
  – Alternatively, could lead to excessive and unpredicted burdens on employers

• What has been the actual experience with standards in labour law?
Good Faith in Labour Law

- The good faith standard sometimes appears in legislation (e.g. Germany, NZ), while in other systems developed by courts (e.g. UK)
- Sometimes covering all contracts (e.g. Germany) but applied differently for employment; in other systems developed only for employment relations
- Usually covering the life of the relationship, but sometimes only termination decisions (Canada)
Good Faith in Labour Law

• Germany: the standard has permitted the courts to ensure that the law is sufficiently dynamic and capable of responding to change (Waas 2011)
  – Preventing “abuse of rights”, e.g. by transferring part of the business to a separate entity
  – Obligation to disclose relevant information
  – Limitations on dismissals above those included in legislation (also for small businesses and during a probationary period)
Good Faith in Labour Law

• UK: “mutual trust and confidence” has been described as revolutionary (Bogg 2011)
  – Prevents dignitarian injuries (intimidation, humiliation)
  – Exercise of contractual rights must be “rational”
  – Duty to give notice before some decisions and provide information in some contexts
  – Employees are prevented from industrial action not conductive to goodwill and confidence
Good Faith in Labour Law

• UK Courts have been criticized for not doing enough (too much self-restraint) and for excessive limitations on employees
• Surely there is room for improvement, but the standard has done more good than bad
• Israel: most notably the standard was used to create new rules in response to new problems
  – A right to a hearing before dismissals
  – Duties of consultation and information, and a duty to bargain with a new union
Conclusions

• Standards can be useful, when used alongside rules, to curb problems of enforcement and to ensure responsiveness to changing realities

• Labour courts are an important factor for standards to have an impact – but not a necessary one

• Standards should be applied/interpreted in a purposive way – to advance labour law (protective) goals