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THE POLITICAL AND LEGAL PHENOMENON OF LEGAL TRANSPLANTS IN LABOUR LAW WITH A FOCUS ON EMPLOYMENT RELATIONSHIP

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To my mother Irena,
my father Dejan and
my brother Balša.

And most of all, to my husband, Claudio.

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INTRODUCTION

This thesis will focus on legal transplants by elaborating legal transplants theories and their motives, and will apply them to labour law. More specifically, it will apply them to the creation of employment relationship in Montenegro, a reform process that has been in place in the country in recent years (as in other countries in the Balkan region) and involves both legislative and institutional change.

There is no overall accepted definition for many legal terms in labour law, as their definitions often depend on the national system. This, however, is a well-known issue in comparative law, which recognizes "legal translation and…the role of language…necessarily at the heart of comparative law".[1]

In this thesis I will follow the interpretation of scholars such as Freedland and Kountouris and consider labour law and employment law to be synonyms.[2]

More specifically, this thesis takes into account the fact, relatively well known among scholars and also in politics, that during legislative reforms countries use comparative legal experiences and practices from legal systems that are either similar to their own legal system or to the legal system they wish to imitate.[3] Often, this process includes the translation of the text of the law from the country of origin or a supranational legal system and the direct transposition of the translated text in the recipient's country.

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[1] M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations*, Oxford University Press, New York, 2011, p. 57.

[2] Ivi., p. 15. Freedland and Kountouris consider labour law and employment law as synonims in European and English legal context, however for the purpose of clarity I will consider them as such for any given legal system, in this thesis.

[3] R. Sacco, "Legal Formants: A Dynamic Approach to Comparative Law (Instalment II of II)", *American Journal of Comparative Law*, vol. 39, 1991, p. 399. 1-34 and 343-401, p.400.

However, as Nelken noted, what is often overlooked is that during the process of political transition, many actors engaged in the process of law reform and legal borrowing borrow from legal systems that come from quite different traditions compared to their own.[4] In this thesis I ultimately wish to explore what the results are when borrowing from rules and experiences that come from quite the opposite legal system.

This thesis will argue that when a country's current legal and political system collapses, in the case in which the legal system is closely connected to the political system of the country itself, the country in question does not necessarily adopt the legal experiences of countries with legal and political systems similar to the one that collapsed. This process of modernization will involve the transplant of legal norms of other legal systems, not necessarily of those with the highest degree of complementarity with the pre-existing legal system. Not only will the legal institutional system change through legal borrowing, but the legal borrowing will have as a consequence a new political, legal and economic system in the country as well. Hence, the country will be unlikely to innovate in legal rules; rather, it may try to catch up with already-existing successful (prestigious) legal rules and models.

According to Sacco,

> A country that has created a rule or institution that others borrow may have an innovative capacity which will lead it to replace this rule or institution by another. If the original rule or institution has been borrowed in the meantime by

[4] D. Nelken, "The meaning of success in transnational legal transfers", *Windsor Yearbook of Access to Justice*, vol. 19 ,2001, 349-66.

> other countries, these countries may preserve it longer than the country of its origin.[5]

The starting point of this thesis is that law is "a product of human interaction"[6] and not a "politically neutral endowment".[7]

In order to carry out this research, I will apply a certain type of classification of legal systems, and in this I will be guided by the thought according to which "no taxonomy of legal systems can claim universality by serving every comparative purpose better that every alternative one".[8] Besides, the "classical" mapping of legal systems, which distinguishes between civil and common law legal systems and is almost unavoidable in today's comparative and legal discussions, appears to be superficial. However, the classification "common/civil law" will still be used in this thesis, since avoiding it would require elaborating specifically and only on this issue, but the limitations of this simplification should be always kept in mind.

As Milhaup and Pistor note,

> …more important than these formal characteristics are the incentives a given legal system generates to invest in innovation and adaptation of governance over time and the way this process is influenced by access to the legal system and the law making and law enforcement stages.…Once we look beyond the caricature of civil law and common law and analyze the way legal systems are organized, we find configurations that are more varied….[9]

For the purpose of this thesis and my own thinking about legal family's influence on legal borrowing, the taxonomy proposed by Mattei, based on the rule of law as a tool

[5] Sacco, op. cit., p. 399.
[6] C. Milhaupt and K. Pistor, *Law & Capitalism*, The University of Chicago Press, United States of America, 2008, p. 22.
[7] Ibid.
[8] U. Mattei, "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems", *American Journal of Comparative Law*, vol. 45, 1997, p. 8.
[9] Milhaupt and Pistor, op.cit., p. 30.

for social organization in the Weberian sense[10], has been more than useful, as it has provided me with food for thought on different challenges with which the law in a specific country is faced.[11] According to Mattei, in all societies there are some main sources of social norms that can affect our behaviour: "politics, law and philosophical or religious traditions, all together".[12]

As a small digression, it should be noted that, rather similarly to this, Djankov et al. argue that a legal system's creation and design is in direct correlation to the political system.[13] What Djankov et al. describe as "conflict between the twin goals of controlling disorder and dictatorship"[14] means that "any system faces the challenge of designing institutions that effectively protect property rights and creating a strong state capable of enforcing property rights, while constraining the temptation of a strong state to infringe on these very rights".[15]

Mattei states that politics, law and tradition as sources of social norms can be seen at play in all legal system with some variations, affecting the human behaviour, and can help us with the legal system's taxonomy.[16] He proposes the following patterns of legal systems: rule of professional law, rule of political law and rule of traditional law.[17] According to Mattei: "In each legal system, or family of legal systems, all three patterns can be seen at play. What changes is the outcome of the competition among

[10] Mattei, op. cit., p. 12.
[11] Mattei, op. cit., p. 12.
[12] Ibid.
[13] Milhaupt and Pistor, op. cit.
[14] S. Djankov, E. Glaeser, R. La Porta, F. Lopez-de-Silanes, A. Shleifer, "The New Comparative Economics", *Journal of Comparative Economics*, vol.34, 2003, p. 597.
[15] Milhaupt and Pistor, op. cit., p. 37.
[16] Mattei, op. cit., p.13.
[17] Ivi., p. 16.

three."[18] Mattei suggests that eventually legal systems can be grouped in families according to the domination of these patterns, leaving the other remaining two patterns to "play a larger or smaller role depending on the scope of the alternative forms of social control left by the hegemonic pattern. Occasionally, non-hegemonic patterns will determine certain legal outcomes in an unofficial, cryptic way, regardless of any official reason".[19] Nevertheless, I noted that what often makes a transition or change slow is the conflict between these patterns within a given system.

In order to perform this research and write this thesis, I also had to elaborate on the concept of comparative law. Rabel was the first researcher to explain that the two concepts of functionalism and context are key in order to understand comparative law. As described by Glendon et al., what he meant was that "You cannot compare legal rules, institutions, or systems without knowing how they function, and you cannot know how they function without situating them in their legal economic and cultural context."[20]

As times change, sometimes the rules applicable to a given legal system also change. As Sacco noted, before the Second World War, legislators in socialist countries did not approve the comparison between socialist and bourgeois law, as these were two opposites.[21] However, Sacco stresses that certain legal rules and values, such as the disapproval of homicide, for example, can survive a change in the material basis of

[18] Mattei, op. cit., p.1 4.
[19]Ibid.
[20] M. Glendon, P. G. Carozza, C. B. Picker, *Comparative Legal Traditions in a Nutshell*, St. Paul: Thompson/West, United States of America, 2008, p. 9.
[21] Sacco, op. cit., p. 6.

society.[22] He notes that after the Second World War, both types of societies have shared public international law and signed international conventions that are the same for all parties. Thus, according to Sacco, the jurists who at first denied the possibility of comparison between socialist and capitalist systems, while explaining the reasons for this denial, were themselves making a comparison without realizing it. [23]

Finally, in this thesis I will use the case study of Montenegro to examine the creation of employment relationships. Montenegro is a particularly interesting case due to the fact that in the last one hundred years it has experienced very different transitions in its legal system. Before the Second World War, the country was organized by typical European civil law labour relations, in which the contract of employment emerged as a regulator, as well as by employment relations. However instead of developing as the rest of Western Europe did, the political changes that occurred after the Second World War created a self-governing socioeconomic type of society, which led to the abolition of the institution of contracts of employment. This would again change in 1990s, when the country experienced a transition towards a free market-based economy. It will be interesting to see how the employment relationship evolved within these different contexts, and to determine the differences between the types of employment relationships in two political and legal systems.

[22] Ivi, p. 7.
[23] Sacco, op. cit., p. 7.

Thesis structure

The first chapter of this thesis will provide the reader with an overview of the literature on the topic of legal transplants and will introduce the different theoretical frameworks and reasoning on this topic throughout the course of history. It will demonstrate how this literature is quite divided in its opinion on legal transplants and will highlight the reasons for this.

The second chapter will introduce the concept of comparative labour law and legal transplants in labour law. We will notice that labour law reform is tightly connected with labour markets and thus with theories of economics and law and economics as well. That is why one part of this chapter is devoted to theories on law and economics and the influence of international financial institutions on labour markets. I will present the work of Sir Otto Kahn Freund, who is considered the father of English labour law and whose writings on the compatibility of law and practice were also useful for the case study on Montenegro. Finally, in the second chapter I will present the work of the International Labour Organization, as the influence of this organization's standards-setting and technical work is of utmost importance for the development of modern labour law and working conditions around the world.

The third chapter will examine the creation of the employment relationship and the emergence of the contract of employment. In this chapter I will also present the case study on Montenegro, where the contract of employment relationship, in the form we have today, did not exist until the 1990s. The case study will analyse how the processes

of transition, which have involved both legal and institutional reform, affected the creation of the employment relationship. The case study analysis will necessarily start by considering the roots of the Montenegrin legal system, focusing specifically on the transition from the emergence of some form of the contract of employment in 1910 and then its marginalization in the 1950s during the socialist self-governing political system to the new democratic-based national constitution 1990s. It will hence investigate how the country has been able (or not) to introduce a new type of regulation of the employment relationship through the contract of employment and legal borrowing.

The thesis will operate both synchronically and diachronically in the process of comparison: it will not only use a comparison between the legal system and the transplants made as they stand today, but will also provide an historical perspective on the process of change that affected the original Yugoslavian legal system.

The relevance of this thesis becomes evident when one recognizes that the economic and legislative development and the process of integration within the European Union that Montenegro aims to achieve in the following years can only be effective if the development also involves the transformation of laws and legal institutions. Martin Upchurch, professor of International Employment Relations at Middlesex University Business School, London, and author of a number of articles on labour issues in Yugoslavia, stated:

> The states of Central and Eastern Europe have accumulated almost sixteen years of experience, whereas the new states of former Yugoslavia have been relativenew-comers to the stage. The country is, in many ways, a special case within the transformation story, having opened up the economy in late 1960s under Tito regime, to foreign direct investment, only for transformation to be stalled in the 1980s and the ensuring period of war. Self-management was a

> particularized form of enterprise governance which may also have left a footprint for future developments in industrial relations.[24]

I will argue that, although labour law can act as a developmental institution, for it to play this role it must be sensitive to conditions in the local environment. Thus, the effectiveness of labour law rules in practice will be dependent on the level of development of the country concerned, and in particular on the nature of other complementary institutions.

[24] M. Upchurch, "Strategic dilemmas for trade Unions in transformation: the experience of Serbia", SEER-*South-East Europe Review for Labour and Social Affairs*, vol. 04, 2006, pp 43-64.

Chapter I LEGAL TRANSPLANTS

1.1 Reasons behind legal transplants

Some scholars agree that in labour law, borrowing legal rules has become an accepted modus operandi when it comes to labour law reform.[25] Being "inspired" by best legal practices has become a common technique when it comes to legal and institutional reforms, not only in the domain of labour law but in any part of the law.[26]Also because of this, much has been written about the use of comparative law in the process of law reform.[27]

From the literature, it appears that the main purpose of what is called a "legal transplant" is reforming the law through legislation or through policy choices, which ultimately affect legal institutional settings.[28] It is also suggested that any system that borrows legal rules does so because it is believed that there is a failure of its own system or that there is a need to follow what may be called a civilizational trend, factor of globalization, market need, requirement for becoming a member of an exclusive club—the list can be exhaustive. As Sacco wrote, "A legal system will borrow when it's incomplete. An incomplete system will tend to imitate just to fill the gaps."[29]

[25] More information can be found in R. Blanpain „Comparativism in Labour Law and Industrial Relations" in *Comparative Labour Law and Industrial Relations in Industrialised Market Economies*, Roger Blanpain (ed), Kluwer Law International, Great Britain, vol. I, 1990.
[26] This technique is used by the governments, international organizations or private experst when advising on the law reform.
[27] J. H. M. Van Erp, „The Use of Comparative Law in the Legislative Process", in *Netherlands Reports to the 15th International Congress of Comparative Law*, E. H. Hondius (ed), Bristol, 1998.
[28] As it will be noticed from the literature overview bellow.
[29] Sacco, op. cit., p. 400.

1.2 Situations in which legal transplants occur

In the case of legal borrowing, I can think of some situations that may arise with regard to three patterns: the legal institutional system, the political system and the economic system. The situation in which legal borrowing has as a consequence new political, economic and legal institutional systems in a country is applicable to the case of Montenegro.

Countries often borrow legal rules from the countries with which they have similar legal traditions.[30] However, this is not always the case with countries whose current legal and political systems have failed—also applicable to the countries of the former Yugoslavia. Furthermore, what should be noted is that legal borrowing is almost never limited only to borrowing from only one legal model or system, unless that is, for example, a political requirement.

As demonstrated below, many legal scholars have contributed to the literature on legal transplants and have tried to define this trend from political, legal, sociological and anthropological points of view. Legal transplants theory became well known when it was described and introduced by Alan Watson in his book *Legal Transplants: An Approach to Comparative Law*, in 1974.

Nevertheless, studies on the reception and diffusion of law in the history of legal-sociological-anthropological scholarship have been conducted since long before Watson published his work on legal transplants; among the scholars who have studied

[30] H. Xanthaki, "Legal transplants in legislation: Diffusing the trap", *International and Comparative Law Quarterly*, vol. 57, 2008, p. 660.

this are Jeremy Bentham, Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, Gabriel Tarde, Sir Henry Maine, and Max Weber, among others. This is also because the question of transferability of law from one system to another is, among other things, one of the central questions in comparative law.[31]

Scholars who research this topic, like William Twining, observe that today, as during the course of history, legal borrowings may symbolize the (colonial) power of laws of some states over others.[32] Similarly, Paul Koschaker has argued that the transposition or transplant of law in fact represents the power and prestige of some countries over others. In this regard, Koshaker observed that the reception of Roman law and the Code Napoleon occurred as a consequence of imperial power and not because these laws were superior in their quality.[33] Besides, as noted by Graziadei, "Legal transplants are surely of interest to those who are interested in the study of relations of power, such as those arising through colonization (and the fate of transplants tells us much about the postcolonial landscape)."[34]

In fact, the word "transplant", in its earliest use from 1440, according to the Oxford English Dictionary, was used in a farming context, while in the 1600s it became the "term of art to denote 'colony'".[35]

Historically, Montesquieu discussed the reception of Roman law in medieval Europe by considering the differences in local conditions and imported law,[36] finding that the

[31] This conclusion is drawn from the fact that the topic has been researched by many comparativists.
[32] W. Twining, "Diffusion of Law: A Global Perspective", *The Journal of Legal Pluralism and Unofficial Law*, Vol. 36, Issue 49, 2004, pp. 1-45.
[33] Ivi, p. 9.
[34] M. Graziadei, „Legal Transplants and the Frontiers of Legal Knowledge", *Theoretical Inquiries in Law*, vol. 10:639, 2009, p. 694.
[35] A. Huxley, "Jeremy Bentham on Legal Transplants", *Journal of Comparative Law*, vol. 2, 2007, p.182.

main problem with the transplantation of legal rules was differences in government, geography and culture.[37] Montesquieu observed that,

> [The political and civil laws of each nation] should be so closely tailored to the people for whom they are made, that it would be pure chance [un grand hazard] if the laws of one nation could meet the needs of another....They should be relative to the geography of the country; to its climate, whether cold or tropical or temperate; to the quality of the land, its situation, and its extent; to the form of life of the people, whether farmers, hunters, or shepherds; they should be relative to the degree of liberty that the constitution can tolerate; to the religion of the inhabitants, to their inclinations, wealth, number, commerce, customs, manners.[38]

In this sense, Montesquieu was the first scholar to look at the spirit of the law, and not only at formal legal rules, which are separated from the cultural, geographical and institutional scopes in which they operate. In his opinion, only in the most unique cases could the transfer of legal norms and institutions from one country to another be successful. As explained in the second chapter of this thesis, Sir Otto Kahn-Freund asks himself whether Montesquieu would, in the time of globalization, write the same.

In reference to globalization, another scholar who wrote about reasons for legal borrowing is Mattei, who noted that in the globalized world, we must allow legal systems to learn from each other. Therefore, transfers of knowledge on legal regulation and traditions, among other things, are needed not only "within different areas of a given legal system, but also among different legal systems."[39]

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[36] Graziadei, op. cit., p. 696.
[37] Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, 1748, trans. T. Nugent and J.V. Pritchard, London, 1914.
[38] Ibid.
[39] Mattei, op. cit., p. 6.

According to Mattei, intellectual globalization has as a consequence the fact that different views in the world of law clash with each other.[40] If we apply this to legal transplants, they will be successful only if their place of origin has a legal framework compatible with the adopting country's framework.[41] However, if we deal with "legal imperialism", then in this case, according to Nelken, "the transfers of knowledge rather than being a pattern of communication and exchange between different legal systems, becomes a one-sided exportation of legal rules and concepts that usually end up being rejected, or creating intellectual dependency."[42]

Nelken wrote that in the present situation, unhappiness with the result of legal transfer is often encountered in countries that seek to resist to the globalization trend,[43] because "globalization has palpably affected the supply and demand for law in many countries and highlighted the fact that law has different functions in different countries."[44]

Scholars such as Mattei have written about and elaborated on the path dependency of law: "Since comparison involves history, by means of comparative study, it is possible to identify the deep differences in the path of legal systems that make that dependency occur."[45] Path dependence, in this regard, refers to the environment in which the law operates and the way the law and the environment are shaped. Therefore, the law is "path dependent" on the environment that creates the "climate" and the realities of the path itself. According to Mattei, due to the path dependency phenomenon, we can

[40] Ivi, p.7.
[41] Ibid.
[42] Ibid.
[43] Nelken, op. cit., p.350 and p.351.
[44] Milhaupt and Pistor, op. cit., p. 45.
[45] Mattei, op. cit., p. 6.

predict the failure or success of legal transplants: he observed that "path dependency seems to be what determines the success or failure of a legal transplant".[46]

Similar to Legrand and Montesque, Mattei does not consider law to be made out of legal rules in a technical sense. The law, according to him, cannot be deprived of cultural, historical and anthropological heritage. However, according to Mattei this does not mean that common elements to legal systems and laws cannot be found—on the contrary, taxonomy, which "reflects the legal culture",[47] is the foundation to proposals of - what Mattei calls- "principled solutions" in law, and it helps lawyers from different legal systems to find a common language.[48] Consequently, the careful study of the path dependence and the correct taxonomy could perhaps predict the success or failure of the legal transplant, according to Mattei.

It should also be noted that legal borrowing, as stated previously, is rarely based on or influenced by only one legal system:

> Modern Japanese law, for example, is as much influenced by American legal culture as by German or French. The new Dutch Civil Code is filled with rules borrowed from France, Germany, and the Common Law. The same may be said of Israel, Italy, and even England since its law has entered its new European dimension.[49]

Furthermore, borrowing could be a matter of prestige, not only of a legal system but also of its particular parts. Thus, what should also be taken into consideration is "the prestige of the legal culture of certain portions of a particular legal system".[50]

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[46] Ibid.
[47] Ivi, p. 5.
[48] Ibid.
[49] U. Mattei, "Efficiency in Legal Transplants: an Essay in Comparative Law and Economics", International *Review of Law and Economics*, vol. 3, 1994, p.4.
[50] Sacco, op. cit.

The theories on the reception of law have been also closely linked to the theory of diffusion in cultural anthropology, in which "diffusionism represented a reaction against the prevailing nineteenth century view that there were natural laws of evolution governing human progress".[51] According to Twining, diffusion of law occurs when one legal system is considerably influenced by another and the definition of "influence" in this case is regarded as one kind of "interlegality".[52] In his work on diffusionism in law, Twining developed a "model of reception that has twelve elements, none of which are necessary and some of which are not even characteristic of most processes of diffusion".[53] He presents his model as follows:

> [A] bipolar relationship between two countries involving a direct one way transfer of legal rules or institutions through the agency of governments involving formal enactment or adoption at a particular moment of time (a reception date) without major change….[I]t is commonly assumed that the standard case involves transfer from an advanced (parent) civil or common law system to a less developed one, in order to bring about technological change ("to modernise") by filling in gaps or replacing prior local law.[54]

As the opposite to legal imperialism, which was mentioned previously, some scholars have written about voluntary reception of law, which occurred, as Twining mentions, in Turkey, Japan and to some degree Ethiopia.[55] Voluntary legal transplants in Turkey happened partially as a consequence of the prestige of certain legal systems, and are described by Turkish scholar Esin Örücü. As she explains, in the case of Turkey, voluntary legal transplants have their basis in the theory of competing legal systems,

[51] Twining, Diffusion of Law, op. cit. p.9.
[52] Ivi, p.16.
[53] W. Twining, „Diffussion and Globalization Discourse", Harvard International Law Journal, Vol. 47, No 2, 2006. p. 511.
[54] Ibid.
[55] Twining, Diffusion of Law, op. cit. p. 9.

supported by a large number of scholars dealing with law and economics and economics in general. Örücü states that "What is regarded today as the theory of 'competing legal systems',[56] albeit used mainly in the rhetoric of 'law and economics' analysis, was the basis of the reception of laws that formed the Turkish legal system in the years 1924 - 1930. The various Codes were chosen from what were seen to be 'the best' in their field for various reasons".[57]

Accroding to Örücü, no single legal system represented a model. Instead, the deciding factors were efficiency, prestige or chance: "it was instead the civil law, the law of obligations and civil procedure from Switzerland, commercial law, maritime law and criminal procedure from Germany, criminal law from Italy and administrative law from France that were chosen, translated, adapted and adjusted to solve the social and legal problems of Turkey and to fit together".[58]

But what is the essential condition without which there is no voluntarism in legal borrowing? According to Örücü, the element that must exist in this context is choice. As she states, "Choice means taking one option as opposed to another, and the existence of choice is what differentiates a reception from an imposition. Thus, the difference between reception and imposition is related to the existence or absence of choice. On this criterion alone, the Turkish experience is a substantial and thorough

[56] As we will see in the part of the thesis that deals with law and economics, Garoupa and Ogus provide with a theory of competition among legal rules according to which "a major step forward was taken with the hypothesis that competition between the suppliers of legal rules will significantly influence the evolution of law."
[57] E. Örücü, "Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition", *Electronic Journal of Comparative Law*, vol. 4, 2000.
[58] Ibid.

experience in 'reception'".[59] Örücü further observes that in the case Turkey, the country has been given complete freedom and voluntary expression in choosing the rules that will govern its legal system, which will then shape the economic system and institutions of the country.

1.3 Overview of the literature on legal transplants

1.3.1 Legal Transplants: Alan Watson

Much of the debate in the literature on legal transplants was triggered by the work of Alan Watson, and in particular by his book *Legal Transplants: An Approach to Comparative Law*, published in 1974. I will try to introduce his work on this topic here.

Watson, an English scholar and an expert in the history of law, believes that the following factors determine a legal system: the existing sources of law, legal borrowing, the nature of legal processes adopted, and the combination of these three factors.[60] In contrast to the view expressed in this thesis, Watson believes that politics does not affect the classification of legal systems: "the nature of the government, whether democratic or tyrannous, does not affect the classification of legal system".[61] It should be also noted that Watson considers that among Western legal traditions the division among civil and common law is properly done, but then he also applies this classification to other non-Western legal systems, considering them systems under Western legal influence. The reason behind is that Watson consideres a civil law

[59]Ibid.
[60] A. Watson, *The evolution of Western Private Law*, The John Hopkins Univesity Press, Baltimore, 2001, preface XI.
[61] Ibid.

system one in which "parts or the whole of Justinian's Corpus Juris Civilis...have been in the past or are at present treated as the law of the land, or at very last, are of direct and highly persuasive force...Common law systems are those that have a dependancy on English law".[62]

Watson states that the borrowing of legal rules happens in the form of legal transplants, by "the moving of a rule or a system of law from one country to another, or from one people to another."[63] Thus, as Galindo observed, according to Watson movement is the main characteristic of a legal transplant, which is "essentially linked to legal development".[64] He further considers that legal rules, principles, institutions and structures can always be subject to legal borrowing.[65] In fact, legal transplants, according to him, explain the growth of law,[66] and "most changes in most systems are the result of borrowing".[67] Watson maintains that legal systems can relate to each other because of legal borrowing.[68]

Watson considers the law as "the intellectual creation of clever lawyers, easily adaptable to local use by other clever lawyers elsewhere on the globe".[69] According to him, lawyers are an elite law-making group in society, and there are certain habits that

[62] Ibid.
[63] A. Watson, *Legal transplants. An approach in Comparative Law 2nd ed*., The University of Georgia Press, United States of America, 1993, p. 378.
[64] G. R. B. Galindo, „Legal Transplants between Time and Space", in *Entanglements in Legal History: Conceptual Approaches*, T. Duve (ed.), Max Planck Institute for European History, Frankfurt, 2014, p. 129.
[65] A. Watson, "Legal transplants and European Private Law", *Electronic Journal of Compartive Law*, vol. 4.4, December 2000.
[66] W. Ewald, "Comparative Jurisprudence (II): The Logic of Legal Transplants", *American Society of Comparative Law*, vol.43, 1995, p.1.
[67] A. Watson, *Legal Transplants: An Approach to Comparative Law*, op. cit., p.95.
[68] A. Watson, *Society and Legal Change*, Scottish Academic Press, UK, 1977.
[69] H. Fleischer, "Legal Transplants in European Company Law – The Case of Fiduciary Duties", *European Company and Financial Law*, Vol. 2, Issue 3, 2005, p. 379.

are common to all lawyers in all legal systems. One of these habits is borrowing legal rules from more prestigious legal systems.[70]

Watson's work on legal transplants is based on legal history, including comparative legal history. One of his first works published on this topic, 1977's *Society and Legal Change*, highlights the idea of legal change based on legal transplants: he observes that "at most times, in most places, borrowing from a different jurisdiction has been a principle way in which law has developed".[71] According to Watson,

> Comparative Law, then, if it is to be an intellectual discipline in its own right, is something other than the study of one foreign system (with glances at one's own), and overall look at the world's systems or comparison of individual rules or of branches of law as between two or more systems, and I would suggest that it is the study of the relationship of one legal system and its rules with another. The nature of any such relationship, the reasons for the similarities and the differences, is discoverable only by a study of the history of the systems or of the rules; hence in the first place, Comparative Law is Legal History concerned with the relationship between systems.[72]

Watson states that borrowing is the principle mechanism through which Western legal systems have developed, and the central theme in comparative law should be the theory of legal transplants.[73] He observes that "the moving of a rule or a system of law from one country to another has been shown to be the most fertile source of legal development since most changes in most systems are the result of borrowing."[74]

In support of his thesis on legal transplants, he uses examples from the diffusion of Roman law, following the movement and reception of Roman legal rules throughout

[70] Ewald, op. cit., p. 499.
[71] Watson, Society and Legal Change, op. cit. p.98.
[72] Watson, *Legal Transplants: An Approach to Comparative Law*, op. cit.
[73] Watson, *Society and Legal Change*, op. cit.
[74] Alan Watson, „Legal Transplants and Law Reform", *Law Quarterly Review*, vol. 94, 1976, p. 92.

continental Europe.[75] He states that: "The mobility of Roman law is geographical as well as historical; Roman-based systems are now at home in icy Quebec, tropical Panama, sunny South Africa, as well as in most of Western continental Europe - in water-filled low-lying Holland, arid mountainous Spain, and in industrial West Germany as previously in pastoral Prussia."[76]

As noted above, Watson considers that the civil law system was created with the acceptance of Justinian's Corpus Juris Civilis: "After the initial acceptance, everything else, including the dominant role of the universities in shaping legal thought, would follow. For this process, once started, to be explicable, no reference need be made to further societal factors, including the general political structure or the organization of practicing lawyers".[77]

According to Watson, since rules can be reduced to writing, they can also be easily physically transported from one place to another.[78] And in fact, as we will see later, the way Watson treats legal rules is one of the main points of disagreement between him and other scholars. In his perspective, little importance is given to the changes of legal rules on their path and any possible transformation that may occur in the transplant process.

Watson also provides examples of modern legal transplants occurring at the international level, which lead to the creation of transnational legal systems. In this regard, he writes about the international sale of goods, which was fostered by the

[75] Watson, „Legal transplants and European Private Law", op. cit.
[76] A. Watson, "The Making of Civil Law", *The Harvard University Press*, 1981, p. 14.
[77] Ibid.
[78] Watson, „Legal transplants and European Private Law", op. cit.

creation of a uniform contract law and by the 1988 United Nations Convention on Contracts for the International Sale of Goods. As this UN convention came into force in many countries, Watson considers this an example of a transplant that shows how foreign law can be accepted and implemented in many different countries. He points out the importance of avoiding the domestic proceedings that would transform this convention into domestic law.[79]

Although many legal scholars considered the unification of European private law extremely challenging, according to Watson, on the contrary, the drafting of a single code of private law for the European Union would be "technically easy, despite political difficulties".[80] In fact, he considers that the act of borrowing is simple, while instead building the theory of borrowing is rather complicated.[81] In addition, for Watson, "legal rules may be successfully borrowed where the relevant social, economic, geographical and political circumstances of the recipient are very different from those of the donor system".[82]

According to Watson, there are many reasons why the borrowing of legal rules occurs. One of them is due to extreme practical utility. It is economically efficient to borrow legal rules, as it facilitates the work of lawmakers.[83] The second reason is because the borrowing happens by chance, by something unpredictable, and hence "the power of mistake must also not be overlooked".[84] He also elaborates on the prestige of laws:

[79] Ibid.
[80] Ibid.
[81] A. Watson, „Aspects of Repeception of Law", *American Journal of Comparative Law*, vol. 44, 1996, p.1.
[82] Alan Watson, „Legal Transplants and Law Reform",op. cit. p. 79.
[83] A. Watson, „Aspects of Repeception of Law"op. cit.
[84] Ivi., p.350.

"When foreign law is given high authority, then when new situations arise, jurists may not find it easy to develop new laws on the basis of irrelevant or even non-existent sources".[85]

Watson introduces the need for authority as a reason for legal borrowing, and many of the examples he provides are based on the spread of Roman law and its reception in relation to the notion of authority. He believes that legal education is a big factor in legal borrowing, as it shapes legal attitudes[86]: "Southern African students educated in law at Edinburgh imported to Botswana, Lesotho and Swaziland some Scots law. A decline in Latinity means that, no matter the attachment to Roman law and Roman-Dutch law in South Africa, the usefulness of the sources is less in the absence of translations".[87]

However, on the effects of transplanted rules, Watson argues that a legal rule, once borrowed from a certain legal system, does not necessarily have the same effect in the destination country. According to him, only legal rules are to be transplanted, not the spirit of a legal system. Therefore, the "transplanting of legal rules is socially easy". [88]

There are many critiques of Watson's theory, and one of the main ones, as put forward by relevant scholars in this field, consists of the consideration that legal rules cannot be separated from culture, history, tradition and politics, which contribute to their creation and enforcement.

[85] Ivi., p.351.
[86] Ivi., p.350.
[87] Ibid.
[88] A. Watson, *Legal transplants. An approach in Comparative, op. cit.* p. 95.

1.3.2 The Ruleness of the Rule: Pierre Legrand

Pierre Legrand, described by some scholars as a cultural pessimist,[89] wrote the following: "It is enough for me to say that legal cultures and the diversity of forms of life-in-the-law they embody, remain the expression of the human capacity for choice and self-creation and, as such, deserve to be respected as incorporating a vital aspect of social existence which helps to define selfhood".[90]

Legrand defends what he defines as the ideal notion of comparativism from legal imperialism, by promoting and trying to preserve the idea of diversity of law and legal cultures, since the "legal is necessarily informed by the cultural".[91] Legrand uses the term "cultural" in relation to law, but he does so in a form that is suitable for legal administration; hence, when courts interpret different understandings, they do so through the lens of the legal system in which they take part, and this shapes their interpretations so as to make them serve the purpose of the given legal system.[92]

Thus the difference among laws and legal systems absolutely exists, but in deciding what we can make of this diversity, according to Legrand, one makes the decision of paying or not paying attention to cultural explanation.[93] Considering that rules as such

[89] See for example M. Krygier and „Is there Constitutionalism after Communism? Institutional Optimism, Cultural Pessimism and the Rule of Law", *International Journal of the Sociology of Law,* vol. 26, 1996, pp.17 – 47.
[90] P. Legrand, "Comparative Legal Studies and the Matter of Authenticity", Journal of Comparative Law, vol. 1, 2006, p. 370.
[91] Ivi., p. 423.
[92] Ivi., p. 445. Legrand concluded: „The question is not whether difference across laws exists: it does. The issue is rather what to make of it, 'and the answer often lies in the conscious or unconscious decision to pay no attention to [culture]', that is, in the articulated or unarticulated prejudice against cultural explanation, envisaged as decorative at best".
[93] Ibid.

only provide us with a superficial image of a legal system, Legrand notes that on the other hand culture

> concerns frameworks of intangibles within which interpretive communities operate and which have normative force for these communities. It occupies a middle ground between what is common to all human beings (if, indeed, there be such commonality) and what is unique to each individual. Culture refers to features that are not universal but that transcend the individual.[94]

According to Legrand, if a set of rules can be established for global usage, irrespective of the legal, political and economic context in which they are to be applied,[95] comparativism and imperialism must become linked, as "the repression is implemented in favour of an institutionalized doctrine that claims to speak all at once and once for all".[96] Therefore Legrand notes that if we proclaim the "bestness", "correctness" or "truthfulness" [97] of only one legal system or set of rules, we inevitably deny any other law, including local law, and we recognize only "beyond-any-law".[98]

Thus, if there exists such a thing as the best legal system, this would imply that this system is the "truth in the law" system. Consequently, this would mean that the law could be objective,[99] because the truth in law and the best law of all laws could be created only if complete and full objectiveness is reached with no external influences, including unconscious cultural influences on the side of the drafter of the text. According to Legrand, however, it is impossible for law to be objective, as he states

[94] P. Legrand, „European Legal Systems are not Converging", *The International and Comparative Law Quarterly*, Vol. 45, No. 1. 1996). p. 56.
[95] P. Legrand, "Comparative Legal Studies and the Matter of Authenticity", op. cit., p. 395.
[96] Ivi p. 386.
[97] Ivi, p. 399.
[98] Ivi., p. 491, as he states, for example like in the case of Kotz who identified the German legal system as "the best".
[99] Ivi, p. 448.

that even "the rules that the European Community and the member States present to their respective constituencies similarly capture a legal culture. These rules are not simple reflections of some natural order. Rather, they are produced by human agency through institutional structures and legal processes".[100]

Therefore, according to Legrand, law is subjective. There cannot be a better law, and while there can be a certain understanding of law, no understanding is universal or can "capture the law as it is".[101] "The only sense in which there will be a 'better' law is in the way some interpretations favouring one particular law will prove more convincing than others within the community of inquirers to which they are addressed".[102]

In his analysis of legal transplants, Legrands asks himself what has been displaced in the case of legal transplant, the "law" or the "legal".[103] He observed,

> Because rules are but the outward manifestation of an implicit structure of attitude and reference, they are a reflection of a given legal culture. This is true of all rules, even the most innocuous ones. This is, therefore, also true of what one can refer to as "meta-rules", that is, the rules developed by a legal system (or, more accurately, by the actors within a legal system) in order to help it manage its body of rules.[104]

What Watson considers the "moving of the rule from one country to another" is supported by the formalist understanding of law, according to which the rules (statutory rules and judicial decisions) are the principal meaning of the "legal". If, for Watson, transplanting legal rules is socially easy, then this, according to Legrand, means that the

[100] P. Legrand, „European Legal Systems are not Converging", op. cit. p. 57.
[101] P. Legrand, "Comparative Legal Studies and the Matter of Authenticity", op. cit., p. 448.
[102] Ivi, p. 449.
[103] P. Legrand, "The impossibility of legal transplants", *Maastricht Journal of European and Comparative Law*, vol. 4, 1997, p.111.
[104] P. Legrand, „European Legal Systems are not Converging", op. cit. p. 57.

law is neither based on nor related to social, cultural and historical circumstances, but rather represents only a function of rules, isolated from society.[105] However, according to Legrand, such a position does not represent legal rules. Rules, as they really are, cannot be separated from their meaning, which in reality represents their essential component—the component that constitutes the "ruleness" of the rule.[106] The meaning of the rule represents the "function of the application of the rule by its interpreter",[107] and it is based on the interpreter's assumptions, which again cannot be independent from the historical and cultural background within which they operate.[108]

Thus, the interpretation of the rule is a subjective act, which is conditioned by the cultural environment and the broader environment in general. This subjectivity is influenced by the subjectivity of everyone with whom the interpreter interacts from the circle of the interpretive community, as they have their own subjectivity in making the interpretation.[109]

Legrand also observes that there is not only one interpretation of a rule; different interpretations exist within one system and they compete, making the winning interpretation the result of power struggles. According to Legrand, "As the

[105] P. Legrand, "The impossibility of legal transplants", op. cit. p.112.
[106] Ivi, p. 114.
[107] Ibid. As Legrand wrote: „meaning is also - and perhaps mostly - a function of the application of the rule by its interpreter, of the concretization or instantiation in the events the rule is meant to govern. This ascription of meaning is predisposed by the way the interpreter understands the context within which the rule arises and by the manner in which she frames her questions, this process being largely determined by who and where the interpreter is and, therefore, to an extent at least, by what she, in advance, wants and expects (unwittingly?) the answers to be. The meaning of the rule is, accordingly, a function of the interpreter's epistemological assumptions which are themselves historically and culturally conditioned."
[108] Ibid.
[109] Ivi, p. 115.

understanding of the rule changes, the meaning of the rule changes. And as the meaning of the rule changes, the rule itself changes".[110]

Therefore, if we transport a rule from one system to another, we are transporting only a set of words, not their meaning, as the meaning is created in a particular cultural, historical and social environment through their interpretation, which is influenced by the subjectivity of the interpreters. This, again, is influenced by the subjectivity of different interpretations within the society, and comes out as the result of different power struggles. This process is unique only for that given system and society.

Hence, even if we transplant a rule as a set of words in the process of legal reform, the meaning, or the ruleness of the rule, cannot be transplanted. "Assuming a common language, the position is as follows: there was one rule (inscribed words a + meaning x), and there is now a second rule elsewhere (inscribed words a + meaning y). It is not the same rule".[111] Rules alone, as also stated above, according to Legrand, "actually tell one very little about a given legal system and reveal even less about whether two legal systems are converging or not. They may provide one with much information about what is apparently happening, but they indicate nothing about the deep structures of legal systems".[112] Therefore, Legrand writes that what can be transported from one jurisdiction to another is only "meaningless form of words",[113] unless a rule may exist

[110] Ivi, p. 117.
[111] Ivi., p. 118.
[112] P. Legrand, „European Legal Systems are not Converging", op. cit. p. 56.
[113] P. Legrand, "The impossibility of legal transplants", op. cit. p. 120. Legrand in this regard wrote: „To claim more is to claim too much. In any meaning-ful sense of the term, 'legal transplants', therefore, cannot happen."

in "solitary state" carrying "definite meaning irrespective of interpretation or application".[114] However, this is not possible:

> All that one can see is that law reformers on occasion find it convenient, presumably in the interest of economy and efficiency, to adopt a pre-existing form of words, which may happen to have been formulated outside of the jurisdiction within which they operate—not unlike the way writers on occasion find it convenient to quote from other authors some of whom will be foreigners.[115]

Hence, the transplanted Roman or French rules to which Watson refers have been interpreted differently in different societies and systems, which makes them different rules that the original ones, according to Legrand.[116]

Legrand also analyses legal transplants theory from a political point of view, as he finds that this theory can be a useful political instrument for some. Additionally, the theory of legal change through legal transplant is superficial, according to Legrand, and it serves to "marginalize difference and correlatively to extol sameness".[117] Thus, the proponents of Watson's theory focus only on the technical level of the law, and this creates "a false consensus which can only be established through exclusive reference to the formalized elements of the object under discussion and through the delegitimation of a notion such as 'tradition' or culture which, in its intricacy, would intervene as an irrational interloper interfering with the production and the perception of empirical regularity", as Legrand notes.[118] Thus, according to him, law does not exist outside a cultural context: "statutes are drafted by individuals, by human beings. Judicial

[114] Ivi., p. 120.
[115] Ivi., p. 121.
[116] Ivi, p. 119.
[117] Ivi, p. 122.
[118] Ibid.

decisions are written by women and men who were educated somewhere, who learned to think about the law over there rather than over here. The same argument goes for textbooks, monographs, and articles".[119]

Legrand and Watson are the typical representatives of two streams of research, Watson being the formalist and Legrand adopting the culturist perspective. However, as noted by J.F Morin, "Most authors fall between these formalist and culturalist perspectives, recognizing that transplanted rules are likely to be interpreted, applied and enforced differently in the adopting legal system".[120]

1.3.3 Legal Borrowing and Legal Formants: Rodolfo Sacco

In his articles on legal formants, Rodolfo Sacco begins by elaborating on whether the study of comparative law should be considered efficient only if it results in legal borrowing or in practical uses. According to the author, comparative law, like any other science, should have as an aim "the acquisition of knowledge".[121]

Sacco observes that it is not appropriate to make a comparison when speaking about legal rules in a given country, because regulations on the same topic can be given on different levels, from the constitutional to the statutory, or with court rules and judicial interpretations or with scholars' opinions.[122] Thus, "if we are then to compare the rules of the Italian legal system with those of the English system, which rule are we to

[119] P. Legrand, „Foreign Law: Understanding Understanding", *Journal of Comparative Law*, Vol.6:2, 2011. p. 161.
[120] J. F. Morin, G. E. Richard., „An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries" p. 19.
[121] Sacco, op. cit.
[122] Ibid.

compare? The constitutional rule, the statutory rule or the judicial rule?"[123] In this regard, comparison must recognize the existence of different "legal formants" within a given legal system, and these are not always uniform: they "may or may not be in harmony with each other".[124]

According to Sacco, legal formant methodology focuses on law as a social activity, while formant in this sense can represent a group or a community involved in the activity in which we are interested. According to this theory and methodology, the law must be always deconstructed in order to allow us to go beyond even the legal tradition discourse. In order to find out what a given legal system is like, we must not only look at the court decisions in a country, or at its statutes and laws, but to "all those formative elements that make any given rule of law amidst statutes, general propositions, particular definitions, reasons, holdings, etc."[125]

In Sacco's opinion, in contrast to Watson's, throughout history the legislators who introduced Roman law and changed local rules did so because of their lack of knowledge, since the Roman rules were the only ones they knew, not because they had previously compared the two systems. In the case of the spread of French law, Sacco states that this was the outcome of the "propagation of liberal ideas, the ideal codification and the prestige of all that was French".[126] The borrowing could take place

[123] Ibid.
[124] Ivi, p. 30.
[125] U. Mattei and M. Bussani, „The Common Core of European Private Law", 2005, published at: http://www.jus.unitn.it/dsg/common-core/approach.html#1.
[126] Sacco, op. cit., p.2.

"because of the desire to appropriate the work of others. The desire arises because this work has a quality one can only describe as prestige".[127]

Thus, according to Sacco, the knowledge of these legal systems, which had to exist to some extent in order for them to be introduced and diffused, is not equivalent to the study of comparative law. This is explained through many cases in which legislators introduced borrowed rules without knowing how to apply them.[128] Nonetheless, Sacco acknowledges the existence of legal borrowing, pointing out that legal borrowing is of central importance when it comes to understanding legal change.

> French Civil Code has found very many imitators: for example, the Piedmonteses with their Codice Albertino, the Neapolitans with their Codice Borbonico, many Swiss cantons, the Dutch, the people of Baden, the Poles in the period of Dutchy of Warsaw, the Russians at the time of Svod Zakonov (1832), then, in second wave of imitations, the Romaniana, the Bulgarians, Turks (with the Mecelle of 1968), the Egyptians, and through imitation of 1948 Egyptian Code, the Somalis (1973), the Algerians (1975), and many others. Again, nineteenth century German doctrine has spread to Scandinavia, Russia, Hungary, Romania, Bulgaria, Slovenia, Croatia, Italy, Spain, Latin America and Holland.[129]

Nevertheless, Sacco does not deny that the study of comparative law can contribute to achieving uniformity among different legal systems, in a situation "in which law is declared to be uniform before the content of the law has been established".[130] As an example, he writes about the supranational law at the European Economic Community level. In this case, comparative law has made possible the creation of uniformity, as the judges of the Court of Justice have created a judge-made law that has been inspired by

[127] Ivi. p. 398.
[128] Ivi, p. 3.
[129] Ivi, p. 395.
[130] Ivi, p. 3.

the laws of different legal systems within the community, only later to be replaced by the uniform law.[131]

According to Sacco, comparative law is also helpful when it comes to imitating foreign legal models, though he acknowledges that the translation of legal linguistic expressions is one of the main problems of comparative law.[132]

On the causes of legal imitation, Sacco writes that these are mainly drawn by the similarities in "cultural, environmental, social and economic conditions",[133] as the system that borrows must integrate the borrowed rule with its other rules. On the other hand, legal imitations are usually caused by imposition or prestige.[134] According to Sacco, the imposition of legal rules has happened rarely throughout history, and imitation has been mainly caused by the prestige. "Today, it is unlikely that a European country will imitate an African model, that the United States will imitate a Venezuelan model, that the Scandinavian countries will imitate Italian model, and so forth."[135] In fact, it is more likely that the more economically developed countries will innovate in their legal rules, just like they will innovate in economic matters, while less developed countries will try to catch up and thus will be borrow.

[131] Ibid.
[132] Ivi, p. 10.
[133] Ivi, p. 398.
[134] Ibid.
[135] Ivi, p. 399.

1.3.4 Legal Irritants: Gunther Teubner

"Good faith is irritating British law" is the phrase that introduces the work of Gunther Teubner and begins his paper on legal irritants.

Teubner described the effect of legal transplants when, in 1994, the European Consumer Protection Directive transplanted the continental principle of bona fides into British contract law. Teubner points out that prior to the introduction of the EU Directive, the notion of good faith in performance and enforcement of contracts had been rejected several times, including by court opinion.[136]

The transplantation of the bona fides principle started a debate among scholars on whether the good faith principle will be rejected or will "function as a successful transplant interacting productively with other elements in the legal organism".[137] Teubner, on the other hand, has decided to use the metaphor of a "legal irritant", as he believes it better describes the situation. This is because, according to Teubner, if we speak about legal transplants, this would mean that legal institutions can be moved easily from one context to another. As this is not the case, the metaphor of legal transplants is misleading.[138] The metaphor of legal transplants create a false impression that the foreign instrument will play the same, identical role in the new environment. On the contrary, however, the foreign instrument "works as a fundamental irritation which triggers a whole series of new and unexpected events. It irritates, of course, the

[136] G. Teubner, Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences, *Modern Law Review,* Vol. 61, 1998.
[137] Ivi, p. 12.
[138] T. Tekle,"Labour law and worker protection in the South: An evolving tension between models and reality", in *Labour law and worker protection in developing countries*, T. Tekle (ed.), Hart Publishing, Oxford, Geneva, 2010, p. 10.

minds and emotions of tradition-bound lawyers; but in a deeper sense—and this is the core of my thesis—it irritates law's 'binding arrangements'".[139]

It is unclear what the effect of a legal rule that has been borrowed will be, according to Teubner, since on its path and during the adaptation the law touches and irritates other social systems, thus making the effect evolutionary and causing unexpected dynamics.[140]

[139] Teubner, op. cit., p. 12.
[140] T. Tekle, op. cit. p. 10.

Chapter II LEGAL TRANSPLANTS IN LABOUR LAW

Some scholars state that labour law and regulation were imposed in numerous cases during the colonial period, and that many of the colonized countries have decided to keep this labour law regulation even in the post-colonial period.[141] Tekle states that "it is important to take into consideration that, in many developing countries the labour law has existed as a 'transplanted' law…More generally, the legal system of countries of the North remained the major reference".[142]

For example, during the colonial period, as noted by Fenwick et al., the development of trade unions was usually restricted or strictly controlled due to the colonial policies that established strict control over the indigenous labour force.[143] In the case of southern Africa, during the post-colonial period and prior to economic liberalization and democratization, "states…retained labour law systems imposed during the colonial period. Like their predecessors, many of the post-colonial states imposed tight restrictions on trade unions and industrial action that amounted to efforts to redefine the role of trade unions".[144] In East Asian states, the post-colonial period was characterized by labour laws that would prevent challenges to the state's economic policies, while in the cases of Malaysia and Indonesia labour laws were transplanted from former colonial rulers.[145] In some cases, like that of Malaysia, "the repressive labour and

[141] Ibid.
[142] Ibid.
[143] C. Fenwick, E. Kalula, I. Landau, Labour law: A southern African perspective, in *Labour Law and Worker Protection in Developing Countries*, T. Tekle (ed.), Hart Publishing, Oxford, Geneva, 2010. p. 178.
[144] Ivi, p. 179.
[145] S. Cooney, T. Lindsey, R. Mitchell, Y. Zhu, *Law and Labour Market Regulation in East Asia*, Routledge, London, 2003.

industrial laws inherited from the colonial period and enhanced by successive post-independence Malaysian governments are still largely in force".[146]

As Jentsch states, "Historical and evolutionary institutional theories link the emergence of and changes in institutions and practices of employment relations with developments in society and the nation-state at large".[147] Therefore, labour law and employment relations are often developed in parallel with the development of a country, since, by influencing the economic system, they were also shaping the path of development of the country itself.

In the past four decades, there has been a global increase in the interest over labour law regulation as the primary tool and source for regulating business and for the creation of a suitable environment for the development of a free-market economy.[148] According to this view, the new (or borrowed) norms in labour law and the way in which they are enforced and implemented will eventually shape the economic system of a country and its labour market.

Besides different state and non-state actors, international financial institutions (IFIs) are very relevant and active players in this regard. As I will show in this chapter, IFIs have often considered too much labour law regulation as a burden to labour market development. For example, some of these institutions describe "labour law as a source of rigidity for the market and as an obstacle for creation of employment. Consistent

[146] Ivi. p. 1968
[147] M. Jentsch, „Theoretical approaches to Industrial Relations" in *Theoretical Perspectives on Work and the Employment Relationship*, B. Kaufman (ed.), Cornell University ILR School, DigitalCommons@ILR, p. 13.
[148] S. D. Anderman, *Labour Law, Management Decisions and Workers' Rights*, Butterworths, London, 1998.

with this thinking deregulation and the flexibilization of labour relations has been part of the policy package that IFIs have recommended to developing countries, often as a condition to aid".[149]

As I will demonstrate below, IFIs have adopted a formalist approach to legal reforms, by relying on Watson's methodology and one of the legal origins of La Porta et al., described further below.[150]

2.1 Legal transplants and labour law in light of law and economics

Weber considered economic factors important, but not the most important factor, in the process of shaping of European legal institutions.[151] What he called a precondition for the creation of capitalism was a rational legal system,[152] and he drew this conclusion from a comparison between Western Europe's industrialized countries and non-industrialized countries. In his analysis, Weber was always "deeply concerned with the interaction between legal and socio political structures and the institutions they produced".[153] Trubek observed that according to Weber the main difference between

[149] Tekle, op. cit., p. 28.
[150] La Porta states: „Of course, following the transplantation of some basic legal infrastructure, such as the legal codes, legal principles and ideologies, and elements of the organization of the judiciary, the national laws of various countries changed, evolved, and adapted to local circumstances. Cultural, political, and economic conditions of every society came to be reflected in their national laws, so that legal and regulatory systems of no two countries are literally identical. This adaptation and individualization, however, was incomplete. Enough of the basic transplanted elements have remained and persisted (David 1985) to allow the classification into legal traditions. As a consequence, legal transplantation represents the kind of involuntary information transmission that the McNeills have emphasized, which enables us to study the consequences of legal origins." . R. La Porta, F. L. de Silanes, A. Shleifer, "The economic consequences of legal origins", *NBER Working Paper Series*, Working Paper 13608, 2007. p. 7.
[151] D. Trubek, "Max Weber on Law and the Rise of Capitalism", *Wiskonsin Law Review*, Vol. 3, 1972, pp. 720-753.
[152] M. Weber, *General Economic History*, Social Science Classics Series, New Brunswick, 1981
[153] Milhaupt and Pistor, op. cit.

the two types of countries was not only a "rational legal system" but also the "Protestant work ethics". [154]

In his analysis of Weber's work, Trubek noted that:

> The failure of other civilizations to develop rational law helped explain why only in Europe modern, industrial capitalism could arise. Weber believed that this type of capitalism required a legal order with a relatively high degree of "rationality." Since such a system was unique to the West, the comparative study of legal systems helped answer Weber's basic question about the causes of the rise of capitalism in Europe.[155]

Besides, Weber "realized the potential tension between a 'rational' legal system (one that generates stable expectations) and the need for legal adaptation within a rapidly developing economy, but he never fully resolved this tension in his work".[156] Rationality of the legal system, according to Weber, derived from a system's "autonomous, universal and consciously constructed character".[157] According to Douglas North, it is the quality of institutions that contributes to the difference between rich and poor countries.[158] Thus, similarly to Weber's rational legal system, "North sees institutions as playing a role in economic development".[159]

In the 1990s, scholars[160] followed up on Weber's and North's rational systems theories and developed the idea that, depending on legal origin, some legal systems have a greater probability of being effective in supporting economic growth. They investigated

[154] Trubek, op. cit.
[155] Ivi, p. 725.
[156] Milhaupt and Pistor, op. cit., p. 27.
[157] Ivi, p. 225.
[158] Ivi, p.18.
[159] Ibid.
[160] Rafael La Porta, Florencio Lopes de Silanes, Andrei Shleifer and Robert Vishny developed the legal origins theory in 1990s by collecting and analyzing legal and economic indicators with a focus on financial market development.

the legal foundations of economic growth[161] and classified the legal indicators of forty-nine countries according to their legal origin,[162] using the following map of legal systems: English common law, civil law and three subdivisions of the civil law system, German, Scandinavian and French civil law.[163]

In this classification, the country's legal indicators in relation to the quality of shareholder and creditor rights protection were compared against economic outcome variables.[164] The results of the research found that English common law systems arrange for better protection and are more efficient from an economic point of view, in particular as compared to the French civil law systems. [165] La Porta et al. observed that:

> Using a sample of 49 countries, we show that countries with poorer investor protections, measured by both the character of legal rules and the quality of law enforcement, have smaller and narrower capital markets. These findings apply to both equity and debt markets. In particular, French civil law countries have both the weakest investor protections and the least developed capital markets, especially as compared to common law countries.[166]

The theory was originally applied to finance law and economics, only later to be used also with laws that regulate the labour market—thus labour law and in particular laws dealing with provisions on hiring and firing workers.

Some reasons for why the legal origins theory found common law more supportive of economic-oriented outcomes are given by Shleifer and Glaiser,[167] who found that "twelfth-century England's weak central control and powerful local interests led to the

[161] Milhaupt and Pistor, op. cit., p.18.
[162] R. La Porta, F. Lopez-de-Silanes, A. Shleifer, R. W. Vishny, "Legal Determinance of External Finance", NBER Working Paper Series, WP 5879, January 1997.
[163] Milhaupt and Pistor, op. cit., p.18.
[164] Ibid.
[165] Ivi, p. 19.
[166] La Porta et al., op. cit., p. 1.
[167] Milhaupt and Pistor, op. cit., p. 18.

emergence of a jury system insulated adjunction from powerful local magnates, laying the foundation for courts as institutions that protect private interest, in particular, private property rights".[168] In contrast in France at that period the courts were under the control of the Crown, and "the courts therefore tended to serve the monarch's interests and were less inclined to serve the interests of private individuals".[169] Finally, as support for the legal origins theory, these two scholars state: "One area where this greater insecurity of property rights in the civil law countries shows up clearly is the development of financial markets".[170]

Other scholars find explanations in the public choice theories and the "political channel" reality: "Common law systems, because of their support for judicial independence and the power of the courts to control the exercise of executive power, provide fewer opportunities for rent-seeking than systems of the civil law which look to legislation and codification to provide legal solutions, and thereby avoid disruptive distributional conflicts."[171] According to Hayek,[172] "the common law trumps the civil law because courts are better suited than legislatures to continuously adapt rules to the needs of market participants".[173]

[168] Ivi, p. 19.
[169] Ibid.
[170] E. Glaeser and A. Shleifer, "Legal Origins", *Quarterly Journal of Economics*, vol. 4, 2001, p. 3.
[171] S. Deaken, "Legal origin, juridical form and industrialisation in historical perspective: the case of the employment contract and the joint-stock company", *Centre for Business Research, University of Cambridge*, WP 369, June 2008, p. 6.
[172] In the book of F. Hayek, *Law, Legislation and liberty, rules and order*, University of Chicago Press, Chicago, vol.1, 1973.
[173] Milhaupt and Pistor, op. cit., p. 20.

2.2 Labour law reforms and international financial institutions

As mentioned previously, IFIs such as World Bank base their advisory work on legal reform on the research performed by scholars, including those mentioned above and others, who linked law and economic outcomes. The legal origins theory was very useful for the World Bank, which, based on the theory, "established a database that assigns a numerical indicator to each country for a host of institutions ranging from shareholder and creditor rights to labour protections, operation of courts and so on".[174] As Milhaupt and Pistor note: "New findings concerning the relation between law and market development are quickly reported as economic laws of nature in World Bank publications."[175] The importance of this becomes evident when we know that "the World Bank's Doing Business report, which evaluates laws, including labour law, in the light of their economic efficiency, is one of the most powerful tools through which this conception of labour law has been promoted".[176] By the promotion of labour law here, we can also consider the promotion of labour law reforms.

According to the World Bank's Doing Business report, the less regulated the labour market of a country is, the higher that country will be on the WB's scale for doing business, as less regulation means better conditions for business and more employment creation. As found by Fenwick et al., one of the WB's Doing Business reports from

[174] The reports are accessible at: www.doingbusiness.org.
[175] Milhaupt and Pistor, op. cit., p. 20.
[176] Tekle, op. cit., p. 29.

2008 stated that "laws created to protect workers often hurt them – especially women, youth and unskilled workers".[177]

As illustrated by Supiot,[178] in the case of the World Bank, "under this conception the law is virtually viewed as a product in a global market of norms, where a sort of natural selection is operated that sacrifices those laws that are not adapted to the need of the market".[179] As Tekle notes, the danger, among others, is that "protections (*to the workers*) can be reduced in this name".[180]

Edwards observes that where the World Bank was the donor of the laws to third world countries, no meaningful consultations or research have been carried out in order to investigate the compatibility of these legal transplants with the countries' social and cultural realities. He states, "The results were dismal proving that the transplant of laws is rarely successful if the political and social environments of the donor and give rise to culture and values, which do not readily receive such laws. [181]

He further summarizes the process that happens when a third world country approaches the World Bank as follows:

> (1) Potential host is in economic crisis, e.g. balance of payment deficit, and is without the resources to restructure the economy; (2) Potential host approaches high interest international lending agency for a loan and over time interest accumulates and potential host economic situation worsens; (3) Potential host,

[177] C. Fenwick, J. Howe and S. Marshall, „Inovative Labour Regulation: Creating an Enabling Enviroment for Development", presented at Pensilvania State University.
[178] In his work: Supiot, 2005 "Le droit du travail brade sur le „marche des normes"" in Droit Social, No. 12, pp 1087-1096.
[179] Tekle, op. cit., p. 29.

[180] Ivi, p. 29.
[181] G. Edwards, „Legal Transplants and Economics: the World Bank and third world economies in the 1980s – a case study of Jamaica, the Republic of Kenya and the Philippines", Masters thesis, *University of London, School of Advanced Study*, 2007, p. 244.

> in a very low bargaining position, then approaches the World Bank for a loan; (4) World Bank agrees to lend a sum for structural adjustment and after conducting a comparative study or based on previous studies concludes that a certain economic policy would improve the economic situation of the potential host; (5) the loan is disbursed under the conditions that certain policies are to be implemented; (6) local laws are changed to accommodate the conditions (realisation of transplants); and finally (7) host reacts to changes in law (rejection or success).[182]

Besides the World Bank, other international institutions "promote standardized legal reforms to further economic development".[183] These reforms necessarily touch upon the country's labour regulation and industrial relations, in almost all cases while their technical approach to the legal reform is mostly formalist, often underestimating the fact that law is not a "politically neutral endowment"[184] but rather a "product of human interaction".[185]

According to Siedman, the kind of interventions that rely upon Watsons' understanding of legal transplants and the theory of La Posta are called a "Big Bang strategy". He explains it as follows:

> The Big Bang strategy rests on neoclassical economics' explicit premise that markets work basically the same way everywhere. The same laws can work in any market economy. In that model, institutions constitute a 'black box' which require no analysis. Neoclassical economic theory, therefore, seems to imply that if everyone simply pursues their own interests, mirabile dictum, there will emerge the optimal social allocation of goods and resources. In principle, therefore, to draft laws for a Big Bang transformation requires no examination of a country's specific institutional context.[186]

[182] Ivi, p. 254.
[183] Milhaupt and Pistor, op. cit., p.45.
[184] Ivi, p. 22.
[185] Ibid.
[186] A. Seidman and R. B. Seidman, *State and Law in the Development Process. Problem-Solving and Institutional Change in the Third World*, St. Martin's Press, 1994, p. 31.

What "Bing Bang strategy" and Watson's theory lack, as well noted by Edwards, is the socio-political and cultural aspect in which law is operating and in which it has been enforced, and this is crucial for predicting the behaviour of legal transplants in the system. Besides, once introduced, legal transplants, in Big Bang strategy's or Watson's sense, produce immense challenges for the institutional system of the country.

In this respect, the position of the World Bank regarding the economic success of legal systems also leaves some room for a more adaptive approach, in which institutional idiosyncrasies are taken into account. Indeed, the World Bank 2005 report on economic growth and reforms suggests that "the solutions must be found in specific-country context, rather than applied from blueprints, those who advise or finance developing countries will need more humility in their approaches, implying more openness on the range of solutions possible, more empathy with the country's perspective, and more inquisitiveness in assessing the costs and benefits of different possible solutions".[187]

2.2 Law and economics and critique of the legal origins theory

In line with what has been stated previously, I present in Appendix I the table developed by Milhaut and Pistor.[188] These two scholars, in order to check the accuracy of the legal origins theory, examined data from the year 1870 to the year 2000 from the countries belonging to common law systems and civil law systems (with German, French and Scandinavian subgroups). Their research found that the origin of the legal

[187] Milhaupt and Pistor, op. cit., p. 222.
[188] Ibid.

system has "poor predictive power with respect to high and low rate of economic growth for a large sample of countries over long periods of time".[189]

According to Milhaut and Pistor, most of the empirical evidence showing a positive causal nexus between common law systems and economic growth in the legal origins theory is flawed, due to the fact that it only considers quite recent time periods, either from the 1990s onward, or in some cases from the 1960s to the present. In contrast, in their analysis they adopt a much broader perspective and analyse the long-term relationship between types of legal systems and economic growth using data on GDP growth spanning from 1870 up to 2000. The table showing their analysis is in Appendix I.

In order to increase the precision of their analysis, they distinguish between four different time periods: the years preceding the First World War, the period from the First World War to 1950, the years of the economic boom up until the first oil crisis in 1973, and the subsequent years until 2000. They implement multivariate regression analysis to statistically analyse the relationship between the average rate of GDP growth in each country (in each period identified) and their specific legal system, distinguishing between common law and several types of civil law, according to their legal origin.

The results show that in each of the four periods considered, the difference in economic growth rate between common law countries and other countries with a civil law system is never statistically significant, meaning that there is no evidence of a higher rate of

[189] Ivi, p. 24.

growth among common law countries, regardless of the period considered. Quite on the contrary, when the authors distinguish between the different legal origins of the civil law countries, they find that in each historical period considered there is at least one group of civil law countries that performed better than common law countries. In the period 1913-1950, the GDP growth rate of civil law countries with Scandinavian legal origins was significantly higher (in statistical terms) than common law countries; in the economic boom period (1950-1973), civil law countries with German legal origin showed a substantially higher rate of GDP growth, as showed by the statistical significance of the coefficient in the regressions. Such a higher growth rate of GDP in civil law countries with German origin also held during the last and most recent historical period analysed by Milhaut and Pistor.

While these analyses do not control for a number of other important factors that might influence both the rate of economic growth and the type of legal system, leading to possible spurious relationships, the results still provide strong evidence that the commonly assumed correlation between common law systems and higher economic efficiency is not to be considered as a stylized fact in economic and legal theory. Instead, the opposite seems to hold true: in each and every historical period since 1870, other legal systems have been associated with better economic performances, with respect to common law systems.

Milhaut and Pistor support their empirical findings with further case studies that also show how countries with underdeveloped legal systems can still experience very high rates of economic growth. The most typical example of this is China, where in recent years a legal system that was not able to secure property and contract rights was indeed

able to lead the country towards a sustained rate of growth in the last decade. Together with their empirical evidence, Milhaut and Pistor suggest that in most cases the level of development of the legal system does not seem to be a fundamental prerequisite for countries to achieve economic efficiency and higher rates of growth.

Nevertheless, the economic analysis of law appears to be a useful tool, and in fact, legislators are often worried that the legislation should not impose higher costs for doing business, with respect to competitor countries. For these reasons, in line with the suggestions of many IFIs, it is often believed that implementing new legal norms with higher economic efficiency will foster the recovery and development of the country's economy through the creation of efficient economic systems.

An additional factor that supports the idea that legal regulations must ensure efficient economic outcomes is globalization. According to Garoupa and Ogus,

> A major step forward was taken with the hypothesis that competition between the suppliers of legal rules will significantly influence the evolution of law. If domestic industries competing in international markets find that their national legal system imposes on them higher costs than those incurred by foreign competitors operating under a different jurisdiction, they will apply pressure on their lawmakers to reduce the costs.[190]

In other words, if the lawmakers do not reduce the cost, companies might adopt off-shoring or outsourcing strategies to move to countries where legal systems impose lower costs. As a consequence, this may lead to strong pressure on policymakers and regulators to decrease such costs.

Moreover, some scholars also argue that:

[190] N. Garoupa and A. Ogus, "A strategic interpretation of legal transplants", *Journal of Legal Studies*, vol. 35.2, 2006, pp. 339-364.

> without harmonization (of legal rules), businesses selling their product in different jurisdictions incur 'information costs' and greater 'litigation costs' because they need to determine what laws apply in individual jurisdictions; they incur 'inconsistency costs' because they may need to abide with many different governance rules; and they incur losses from 'legal instability' when the law of a foreign jurisdiction applicable to their contract suddenly changes.[191]

That law supports economic activities of course has its foundation in reality, as "markets are essentially made of relationships"[192] while "laws help manage the relationships in a variety of ways", including relationships created in the labour market, and which are creating the labour market itself and the country's economy.[193]

However, laws are not only useful for the management of market-based relationships with regard to the economic system. Milhaupt and Pistore elaborate on different roles that law has in this regard, such as how, in support of the economic system, the law plays not only a protective role but also that of coordination.[194] A useful example in this respect is the German co-determination[195] regime known as *Mitbestimmung*, which allows the workers of a company to elect their representatives:

> By mandating employee representation on the supervisory board, which appoints the management board, the law forces shareholders and management to bargain with employees over corporate strategies, not merely specific measures that might affect employees at their workplace…the critical point is that the design of legal system can be used to reflect social and political preferences for collective bargaining and coordination as opposed to individualized rights enforcement.[196]

[191] A. Baniak, P. Grajzl, „Interjurisdictional Linkages and the Scope for Interventionist Legal Harmonization", *Cesifo Working Paper*, No. 3085, 2010. p. 10.
[192] Milhaupt and Pistor, op. cit., p. 32.
[193] Ivi, p. 32.
[194] Ibid.
[195] Ivi, p. 33.
[196] Ivi, p. 34.

Evidently, as pointed out by Milhaupt and Pistor, in the case described above the law plays the role of coordinator of actors' behaviour, in this specific case related to the economic activity at the firm or enterprise level. However, at the same time, in this particular case the law plays also a protective role by protecting the workers from the arbitrariness or self-will of the employer or management. By allowing workers to organize at the firm level and take part in collective bargaining, the chances for the employer to abuse its power are reduced. Additionally this kind of regulation contributes to the creation of a more balanced correlation of powers in firms or enterprises, which altogether contribute to the creation of a more balanced economic system, or one that is more sustainable from a societal point of view.

Besides the role of coordination and protection, according to Milhaupt and Pistor, law also supports economic activities "by playing auxiliary roles such as signalling and credibility-enhancement".[197] Regarding signalling, "law not only helps set the rules by which market activity takes place, but it also makes a larger statement about governmental priorities, the future direction of policy, the relative strength of interest groups concerned with a specific issues, and other information that may be useful to the market actors".[198]

On the other hand, credibility enhancement ensures effective governance and reduces the costs of what would be the consequences of governance that is not effective. As

[197] Ivi, p. 34.
[198] Ibid.

Maxilield and Scheinder put it, "credibility in this context means that capitalists believe what state actors say and then act accordingly".[199]

In summary, according to Milhaupt and Pistor there are four functions that law performs in support of economic activity: protection, coordination, signalling and enhancing credibility.

Nonetheless, Djankov and Ramalho found that the World Bank stated that "developing countries with rigid labour regulation tend to have larger informal sectors and higher unemployment, especially among young workers".[200] Commenting on the World Bank attitude, Deakin observes that, "It is assumed here that the basic economic model of the employment contract, in which powers of direction are reserved to the employer and a competitive labour market ensures an equilibrium between supply and demand, is an efficient one, which regulatory intervention will mostly likely undermine".[201]

One of the major examples of IFIs' interventions is the privatization and market liberalization processes in Latin America after the economic crisis in the early 1980s. Prior to 1980, Latin American governments played a major role with respect to the pace of industrialization and the functioning of the internal markets.[202] In this pre-liberalization period, "The state would take active steps to raise industrial wages, while

[199] S. Maxfield and B. R. Schneider, Business, the state and economic performance in developing countries, in *Business and state in developing countries*, S. Maxfield and B. R. Schneider (ed.), Cornell University Press, 1997, pp. 3-35.
[200] S. Djankov and R. Ramalho, "Employment Laws in Developing Countries", *Journal of Comparative Economics*, vo. 37, October 2008, p.1.
[201] S. Deaken, op. cit., p. 4.
[202] G. Bensusan, Labour law in Latin America, the gap between the norms and reality, in *Labour Law and Worker Protection in Developing Countries*, T. Tekle (ed.), Hart Publishing, Oxford, Geneva, 2010, p. 137.

subsidizing and protecting national industry, thereby creating an environment that was conducive to the protection of the wage earners".[203]

The arrival of the financial crisis in the early 1980's and the subsequent intervention of IFIs (in particular the International Monetary Fund) brought as the main consequences trade liberalization and privatization and the progressive reduction of state intervention, i.e., deregulation. This eventually attracted foreign direct investment and created an environment able to attract capital flows. However, the reform also led to "the extension of precarious employment – for some the feminization of employment – and the exclusion of groups of workers from the social protection". [204]

Although these policies allowed the economies of Latin American countries to recover from the economic crises and led to a sustained rate of growth during the nineties, the market deregulation policies contributed only to a limited extent to the creation of new jobs in the formal economy.

These by-products of the policies implemented in the 80s also had long-term consequences: in 2005 Latin America "was the second largest world region in terms of the average size of the informal economy after sub Saharan Africa".[205] Today, the International Labour Organization (ILO) reports that "more than half of the world's workforce is estimated to be trapped in the informal economy",[206] and as Fenwick, Howe and Marchall note, "the persistence of informal employment, and the fact that

[203] Ivi, p. 137.
[204] Bensusan, op. cit., p. 139.
[205] Ibid.
[206] Information taken from the ILO website: http://www.ilo.org/ilc/ILCSessions/104/media-centre/news/WCMS_375615/lang--en/index.htm.

most workers are not covered by formal labour regulation, might be thought reasons to pause to wonder whether formal labour regulation is really the issue."[207]

The Latin American example shows that an interpretation of law that only considers it as a necessary support for the implementation of free-market mechanisms might not necessarily lead to satisfactory results, especially for what concerns employment outcomes and the protection of workers' rights. This is especially relevant in economies in transition. This occurs because the support for deregulation and reduced state intervention as the best support for economic systems is not always backed by strong empirical evidence. Market failures are a typical example of the shortcomings of neoliberal economic thought. The markets are not always able to allocate resources efficiently: whenever externalities, information asymmetries or opportunistic behaviours emerge the markets may not be the best mechanism to allocate the factors of production, and may often lead to non-Pareto-efficient outcomes. In all of these cases, the legal framework should not be conceived as a simple prerequisite for the efficient working of market forces, but rather at least as a counterbalance able to remedy market inefficiencies.

Besides market failures, another factor that might undermine the efficiency of policies that strongly rely on the ability of markets to self-regulate is the fact that markets are always in constant evolution, "typically because of the introduction of new technologies, the ability of new entrants to participate in the labour market, or the need for new rules to govern market conduct".[208]

[207] Fenwick et al, op. cit., p. 1.
[208] Milhaupt and Pistor, op. cit., p. 28.

Market failures and information asymmetries can also strongly undermine the efficiency of labour markets. Information costs and signalling problems often reduce the ability of demand (the employers) and supply (the workers) to reach a satisfactory level of job matching, that is, to increase the probability that suitable candidates are hired for the appropriate job positions. Whenever labour law reforms are implemented, such relevant inefficiencies of the markets should be kept in mind.

Another important prerequisite for the application of economics to law-related problems consists of the assumption of the rationality of actors. According to such an assumption, i.e., that individuals can rank alternatives on the basis of their preferences and pick the one that they prefer on the basis of the available possibilities, "A rational consumer should choose the best alternative that the constraints allow".[209]

However, as shown by Kahneman and Tversky, the fundamental assumptions of rational choice theory can be violated in some specific environments. They found that "The modern theory of decision making under risk emerged from a logical analysis of games of chance rather than from a psychological analysis of risk and value. The theory was conceived as a normative model of an idealized decision maker, not as a description of the behavior of real people".[210] Therefore, in this case the application of economic models to evaluate the efficiency of legal systems might also have some important flaws.

[209] R. D. Cooter and T. Ulen, *Law and Economics*, Pearosn Addison – Wesley, Boston, 2007, p. 16.
[210] A. Tversky and D. Kahneman, „Rational Choice and the Frameing of Decision", *The Journal of Business,* Vol. 59, No. 4, Part 2: The Behavioral Foundations of Economic Theory. (Oct., 1986), pp. S251-S278.

It would seem that in the labour market, and in particular with regard to employment relations in free market economies, labour relations should mainly deal with the balance between the owners of the capital and the workers. As described by Collins, Ewing and McColgan

> From a political perspective the employment relation lies at the centre of a fundamental conflict of interest that is intrinsic to capitalist societies. The conflict lies between the owners of capital, who invest in productive activities, and the workers, who supply the necessary labour. Employers seek to maximise the return on their investments, whereas the workers seek the highest price available for their labour, which digs into the employer's profits. As in other contractual relations, however, the parties ultimately share a common interest in the successful achievement of production and profits through the combination of capital and labour.[211]

Finally, as pointed out by Freedland and Kountouris, the priority of policymakers who opt for an economics perspective to law is "for labour law interventions to ensure or at least not to undermine the competitiveness of the employing enterprises which are subject to those interventions".[212]

2.3 Sir Otto Kahn-Freund

One of the leading labour law scholars, Sir Otto Kahn Freund was the first scholar to give a comprehensive picture of English labour law. He provided a philosophical approach to English labour law by applying knowledge from the German industrial relations system to it, bearing in mind the particularities of the English law system. For this current research, his work is important because he was one of the first scholars to

[211] H. Collins, K. D. Edwing, A. McColgan, *Labour law, Text and Materials*, Hart Publiching, Portland, 2005.
[212] Freedland and Kountouris, op. cit., p. 45

highlight the difference between the law and practice in labour law, pointing out the capacities of the enforcing institutions to implement the law in certain cases.

Besides this, in the field of labour law Kahn-Freund's work on legal transplants is of utmost importance. He considered that there are three degrees of transferability of law, and that the chances for the success of a legal transplant depend on geographical, economic, social and political factors.[213] However the influence of these factors will vary, depending on the country's context:

> the degree to which any rule, say on accident liability or on the protection of the accused in criminal proceedings, or any institution, say a type of matrimonial property or of commercial corporation or of local government, can be transplanted, its distance from the organic and from the mechanical end of the continuum still depends to some extent on the geographical and sociological factors mentioned by Montesquieu, but especially in the developed and industrialized world to a very greatly diminished extent.[214]

According to him political factors and political structures are the most important elements when it comes to transferability of law.[215] In addition to this, how strongly legal institutions are connected with society is also one of the main factors in determining the possibility of legal transplant.[216] Kahn-Freund asked what the writings of Montesquieu on cultural diversities would have been had he lived in the twentieth century:

> Would Montesquieu have written about cultural diversities the way he did, had he been able to anticipate that everywhere people read the same kind of newspaper every morning, look at the same kind of television pictures every night, and worship the same kind of film stars and football teams everywhere?

[213] O. Kahn-Freund, "On uses and Misuses of Comparative Law", The Modern Law Review, vol. 37, 1974, pp. 1-27.
[214] Ivi, p. 12.
[215] Ibid.
[216] Ibid.

> Industrialisation, urbanisation, and the development of communications have greatly reduced the environmental obstacles to legal transplantation-and nothing has contributed more to this than the greater ease with which people move from place to place.[217]

In his writings Kahn-Freund welcomes the tendency of "foreign influences" on law, subject to some limitations, and states that there are three possibilities when this kind of influence should be considered. The first possibility aims at "preparing the international unification of the law, secondly, with the object of giving adequate legal effect to a social change shared by the foreign country with one's own country, and thirdly, with the object of promoting at home a social change which foreign law is designed either to express or to produce".[218]

The work of Kahn-Freund was inspired and influenced by the work of his professor, Hugo Sinzheimer, who "constructed" the Weimar labour legislation in Germany. Sinzheimer, and later his student Kahn-Freund, considered that lawyers must not study only formal legal rules but also the link between legal philosophy and legal beliefs, on the one hand, and social and economic powers on the other. However, in contrast to Sinzheimer, Kahn-Freund was more critical of the "Weimar judiciary and policies of state intervention".[219] The fact that he witnessed the birth of the Nazi state left a footprint on his philosophical thinking on state interventionism in law, and this was

[217] Ivi, p. 9.
[218] Ivi. p. 2.
[219] R.Dukes, „Otto Kahn-Freund and Collective Laissez-Faire: An Edifice without a Keystone?", The Modern Law Review, Vol. 72, Issue 2, 2009, p. 232.

reflected in his analysis of labour law in England. Through his life he considered that "the undermining of collective institutions, contributed to the rise of Nazism".[220]

Kahn-Freund identified collectivism with the principle of collective labour law, as noted by Dukes,[221] and he observed that

> The socio-political system of collectivism is characterized by a particular attitude of the state towards the class struggle. The legal system does not negate the class struggle or suppress it, but it does not allow it unlimited freedom; it rather attempts, within the framework of the capitalist system, to determine the way it is conducted by the establishment of legal norms and, over and above this, to utilise the results of each individual stage of conflict for the further development of the law.[222]

Hence he advocated for the state's limited intervention when it comes to collective bargaining between employers' and workers' unions, with an idea that "the state would allow the trade unions and employers' associations freedom to regulate social policy through the autonomous negotiation of collective agreements, and would give its support to that regulation by guaranteeing the agreements' 'compulsory normative effect'".[223]

As observed by Dukes, Kahn-Freund believed that if the state intervened in the bargaining between employers and workers' for its own interests, this would be the opposite of the principle of collectivism.[224] When they are free from state intervention, the collective agreements have a greater ability to adapt and evolve in order to meet

[220] R. Dukes, *The Labour Constitution, the enduring idea of labour law*, Oxford University Press, New York, 2014, p. 73.
[221] R. Dukes, *The Labour Constitution, the enduring idea of labour law*, op. cit., p. 72.
[222] O. Kahn-Freund, „The Changing function of Labour law" in *Labour Law and Politics in the Weimar Republics, R.* Lewis and J. Clarck (eds), Oxford, 1981, p. 172.
[223] Dukes, Otto Kahn-Freund and Collective Laissez-Faire: An Edifice without a Keystone?, op. cit., p.282.
[224] R. Dukes, *The Labour Constitution, the enduring idea of labour law*, op. cit., p. 73.

changing economic and industrial realities, as noted by Deakin.[225] The role of the state in regulating collective bargaining would be to make this bargaining possible and free from state intervention.

To his writings on collective laissez-faire, Kahn-Freund applied his thoughts on transplanting laws. Consequently, in the "1950s, Kahn-Freund re-evaluated parts of this early work, rejecting the method of applying German law principles straightforwardly to English circumstances. It was then that he developed the notion of collective laissez-faire, highlighting and explaining the particularities of the British system". [226]

After noting that the law in England plays a minor role in regulating labour relations when compared to Germany,[227] Kahn-Freund observed that "There is, perhaps, no major country in the world in which the law has played a less significant role in the shaping of these relations than in Great Britain and in which to-day the law and the legal profession have less to do with labour relations".[228] Accordingly, he noted that in contrast to Weimar Germany, "no legal rule existed in the UK which rendered the terms of collective agreements legally binding as a matter of course".[229] In fact, he wrote that collective agreements in England "are intended to yield 'rights' and 'duties', but not in the legal sense; they are intended, as it is sometimes put, to be 'binding in

[225] S. Deakin and G. S. Morris, *Labour Law*, second edition, Butterworths, London, 1998.
[226] Ivi, p. 230.
[227] A. C. L. Davis, *Perspectives on Labour Law*, Cambridge University Press, New York, 2009.
[228] O. Kahn-Freund,"Legal Framework" in *The System of Industrial Relations in Great Britain: its history, law and institutions*, A. Flanders and H. A. Clegg (eds), Oxford: Blackwell, 1954, p. 44.
[229] Dukes, Otto Kahn-Freund and Collective Laissez-Faire: An Edifice without a Keystone?, op. cit.,p.232.

honour' only, or (which amounts to very much the same thing) to be enforceable through social sanctions but not through legal sanctions".[230] He observed that:

> the presence of unions successfully redressed the power imbalance between workers and employers…that workers' rights were more secure if they were acquired through collective bargaining rather than through constitutional or legislative guarantees…that collective laissez-faire was more flexible than legislation because it allowed unions and employers to decide things for themselves and to respond to changing circumstances.[231]

As a consequence, some scholars point out that Kahn-Freund was faced with the paradox of having to observe in England "one of the best developed systems of voluntary collective bargaining"[232] on the one hand, and on the other no statutory regulation linking the collective bargaining to the employment relationship and its legal construction.[233]

In fact, Kahn-Freund was aware of the low level of employment protection legislation in national regulation,[234] and it has been observed by some that his final aim was the integration of collective bargaining and workers' protection regulation in the standard employment contract.[235] Employment protection legislation embraced the employment contract as the foundation for the regulation of the individual employment relationship in England in the 1970s.[236]

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[230] O. Kahn-Freund,'Legal Framework', op. cit., pp. 57-58.
[231] Davis, op. cit.
[232] M. Freedland, "Burying Caesar: What Was the Standard Employment Contract?" in *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment*, HW Arthurs and KVW Stone, (eds.), Russell Sage Foundation, New York, 2013, p. 89.
[233] Ibid.
[234] Ibid.
[235] Ibid.
[236] S. Deakin, Labour Law, op. cit., p. 31.

In this regard, one of the Kahn-Freund's hypotheses was that the statutory provisions on employment protection were not well integrated with the common law in England. Thus, what is suggested in the literature is that Kahn-Freund was not only concerned with the regulation of an employment contract, but was also concerned that once the contract of employment was regulated it was not certain that the institutions would be efficient in enforcing it.[237] This idea was expressed in one of his last writings, *Blackstone's Neglected Child: The Contract of Employment* (1977), in which he wrote about the "integration variable" and Blackstone's "failure to treat the contract of employment as the general foundation of the service relation"[238] and how he was "intellectually helpless in the face of legislation, unable to see statute law and common law as a whole".[239]

With the politics of economic deregulation and liberalization in the 1970s in England, labour law was used "not as a means of achieving distributive goals or embodying a notion of industrial justice, but as a part of an economic policy designed to foster competitiveness".[240] Some scholars suggest that the disintegrated vision of the statutes on employment protection legislation and common law practice was in fact what made the deregulation policy quicker and stronger. As put forward by Freedland:

> But might we not have predicted that the political impulses of recent years towards deregulating the employment relationship and dismantling the standard employment contract would assert themselves more quickly and more strongly

[237] Freedland, op. cit.
[238] O. Kahn-Freund, "Blackstone's neglected child: The Contract of Employment" (1977), Law Quarterly Review, 1977, p 527.
[239] O. Kahn-Freund, "Blackstone's neglected child: The Contract of Employment", op. cit.
[240] Ivi, p. 39.

in labour law systems under which there had been a less integrated vision of the standard employment contract in the first place?[241]

2.4 Role of International Labour Law

The role of international labour law is important in shaping labour markets throughout the world, as it sets up the minimum standards that should be respected and adapted in accordance with national circumstances when regulating labour relations.

International labour law is composed of a corpus of international labour standards (ILS), conventions and recommendations, which as international regulatory mechanisms of labour relations and human rights in the world of work are adopted by the member states of the ILO. Prior to the adoption at the state level, all conventions and recommendations this organization adopts need to be agreed upon among the representatives of workers and employers organizations and those of the governments and adopted by two-thirds of votes of the representatives. This reflects the policy of the organization, that is, to promote balanced labour markets and social dialogue among its tripartite constituents in the world of work-related policies.

It was one of the stepping-stones for workers' rights globally when in 1944 the ILO Declaration of Philadelphia proclaimed that labour is not a commodity,[242] meaning that

[241] Freedland, op. cit., p. 91.

[242] "The Conference reaffirms the fundamental principles on which the Organization is based and, in particular, that:
(a) labour is not a commodity;
(b) freedom of expression and of association are essential to sustained progress;
(c) poverty anywhere constitutes a danger to prosperity everywhere;
(d) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic

people should be treated with dignity and respect and not as a capital. This approach also underlines the human rights dimension of workers' treatment in employment and occupation, and is fundamentally opposed to the approach according to which "labour is simply a unit of production, to be bought and sold, and with a market value".[243]

Social dialogue and tripartism, which are among the core values of the ILO, are also being promoted within the member states as key policy instruments for regulating the labour market. This means that the organization promotes in its member countries dialogue between the representative organizations of employers and workers (bipartite) or, at the state level, between the representative organizations of employers, workers and the state (tripartite) over the world of work-related issues; here, among other issues, are included labour and employment law-related reforms. The social dialogue approach is also promoted and guaranteed by several ILO instruments, of which the most important are the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); and Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). Additionally, Conventions No. 98 and No. 87 provide the guarantee of one of the four fundamental or core labour rights—freedom of association and the effective recognition of the right to collective bargaining in the ILO Declaration on Fundamental Principles and Rights at Work.

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decision with a view to the promotion of the common welfare." Art. 1 of the ILO Declaration of Philadelphia.

[243] R.Benny, S. Hardy, R.Upex, *Labour Law*, 1st edition, Oxford University Press, New York, 2004, p. 20.

The core labour rights must be respected by the ILO member states even if the country in question did not ratify the relevant convention. The ILO Declaration on Fundamental Principles and Rights at Work states in article 2 that:

> …all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:
> (a) freedom of association and the effective recognition of the right to collective bargaining;
> (b) the elimination of all forms of forced or compulsory labour;
> (c) the effective abolition of child labour; and
> (d) the elimination of discrimination in respect of employment and occupation.[244]

Although the International Labour Conference (ILC) discussed the subject of employment relationships in 1997, 1998 and 2003, the agreement to vote for a convention on this topic has never been reached. Instead, in 2006 the Conference voted on a Recommendation on Employment Relationship, No. 198 (R198).

As noted in the Guide on R198, in the years prior to the adoption of the recommendation, and probably the reason why the discussion at the ILC ended with a non-binding international instrument, "The issue of who is or is not in an employment relationship – and what rights/protections flow from that status – has become problematic in recent decades as a result of major changes in work organization and the adequacy of legal regulation in adapting to those changes".[245]

In addition, and as noted in the Guide, there is disagreement among member states with regard to situations in which "(1) the respective rights and obligations of the parties

[244] Available at: http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm.
[245] ILO, The Employment Relationship, an annotated guide to ILO Reccommandation No. 198, 2007.

concerned are not clear, or where (2) there has been an attempt to disguise the employment relationship, or where (3) inadequacies or gaps exist in the legal framework, or in its interpretation or application."[246]

R198 sets out in paragraph 2 that "The nature and extent of protection given to workers in an employment relationship should be defined by national law or practice, or both, taking into account relevant international labour standards", while "National policy should be formulated and implemented in accordance with national law and practice in consultation with the most representative organizations of employers and workers".[247] Therefore, R198 leaves to the member countries how to define the nature and extent of the protection, though it limits this freedom with the minimum protections that are set in the international labour standards. It also states that the policy should reflect the consensus the state shall try to reach when negotiating with most representative workers' and employers' organizations.

What is also interesting is that R198 calls for states to provide "for a legal presumption that an employment relationship exists where one or more relevant indicators is present".[248] As far as the specific indicators are concerned for the determination of an employment relationship, the Recommendation suggests that these should be defined in the national laws and regulations and suggest the following in article 13:

> (a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party

[246] Ivi, p. 3.
[247] Ivi, paragraph II.
[248] Ivi, (paragraph 11 b).

> requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;
>
> (b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.[249]

Although it represents a non-binding legal document, the relevance of R198 is recognized by the national courts of many countries, and when lacking national regulation they sometimes decide to call upon this recommendation in their court decisions. This happens most often with cases that concern the determination of the existence of an employment relationship.

In the court decision of Brazil's Regional Labour Tribunal of the Third Region from 30 September 2003, in determining the existence of an employment relationship in the case of a worker in a cooperative,[250] the judge referred to Recommendation 198 and quoted paragraph 8(b): "Ensure that cooperatives are not set up for, or used for, non-compliance with labour law or used to establish disguised employment relationships, and combat pseudo cooperatives violating workers' rights, by ensuring that labour legislation is applied in all enterprises".[251]

[249] ILO, Employment Relationship Recommendation, 2006, No. 198.
[250] Summary of the court case is taken from the ITC ILO's website and ITC ILO's Compendium of Courts decision. The full text of the summary is cited in the Appendix 2.
[251] Available at: http://compendium.itcilo.org/en/compendium-decisions/regional-labour-tribunal-of-the-third-region-rogerio-ferreira-goncalves-1-infocoop-servicos-2013-cooperativa-de-profissionais-de-prestacao-de-servicos-ltda-2-caixa-economica-federal-cef-responsavel-subsidiaria-30-september-2003-00652-2003-017-03-00 Last accessed on 12 December, 2015.

The Industrial Court of Trinidad and Tobago, in the case of Insurance and General Workers' Union v. Tri-Star Latin-America Ltd., South West Regional Health Authority, Tobago Regional Health Authority of 23 January 2007, referred to paragraph 9 of R193, which reads as follows: "…the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties".[252]

Besides the influence of international labour standards on countries' labour law regulation, as described above, the International Labour Organization's technical experts provide technical comments on draft labour law-related regulation when called upon by the tripartite constituents. The aim of this kind of support is to provide assistance to the member states to draft legislation that is in line with ILS and also best practices. Thus, the experts provide their technical comments both in light of ILS and in light of best comparative practices. In this regard, Employment Relationship Recommendation 198, together with the ILO Convention on Termination of Employment No. 158, represent the two most relevant instruments from the point of view of ILS, when the aim of the reform is to introduce in legislation flexible forms of work.

[252] The full text of the summary is cited in the appendix III.

In addition, some countries have decided to directly transplant the conventions or their articles into national legislation. Australia, for example, directly transposed the ILO Convention on Termination of Employment No. 158 into its country's legislation.[253]

Apart from the ILO's technical intervention in labour law reforms, the ILO influences the world of work regulation through its direct supervisory system on the application of conventions and recommendations ratified by member states, called the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR). CEACR represents a sort of monitoring mechanism for the ILO, which should eventually ensure that all ratified conventions and the ILO core conventions are actually enforced within the member states through legislation and/or in practice. The comments of this committee on the application of ratified conventions for all member states are available online.

[253] ILO, Note on Convention No 158 and Reccommandation 166 concerning termination of employment, 2009, p. 4.

Chapter III CONSTRUCTION OF THE EMPLOYMENT RELATIONSHIP AND CASE STUDY OF MONTENEGRO

In the previous chapter I showed that an internationally recognized regulation of the employment relationship exists and, although not binding—since it was voted on in the form of a recommendation—it can still represent a source of guiding principles when setting up the minimum standards for protecting and covering all workers who are in some kind of employment relationship. It was also stated that regulation of an attempt to disguising an employment relationship is a point of disagreement among different labour market actors of different countries.

When it comes to the practice of disguising an employment relationship, certain groups of workers are more vulnerable than others, however it has been acknowledged that workers in the informal economy are recognized as among the most vulnerable. Some scholars point out that in this informal relationship, the worker and employer "share an unwritten understanding about pay, hours, work quality, working conditions, job security, and other dimensions of employment".[254]

There are different views on why the informality happens. The one according to which the cost of the design and enforcement of the employment contract is seen as a major reason for the informality[255] has been debated by scholars who are not in favour of the deregulation of the labour market. They showed that, as we saw in the case of Latin

[254] M. Bertrand, "From the Invisible Handshake to the Invisible Hand? How Import Competition Changes the Employment Relationship", Journal of Labor Economics, vol. 22, No 4, 2004, p. 724.
[255] Ibid.

America, this kind of practice, while making the employment contract less "expensive" to design and enforce, does not necessarily lead to the opening of new jobs in the formal economy.

Moreover, as stated by Fenwick, Howe and Marshall, "If treated unfairly by their employers, informal employees usually have no recourse to the courts, because their employment relationships are rarely documented."[256] As stressed in the statement above, the fact that it is not documented does not mean that the employment relationship does not exist. In this thesis I will resort to the reasoning according to which as long as there is a relationship of work being performed in return for remuneration, an employment relationship exists.

In order to protect workers from possible abuses and to balance the relationship of power on the side of the employers and the workers, many labour laws do not provide for an explicit provision according to which the contract of employment should or should not be in written or in oral form, nor do they provide a provision according to which the employment relationship is based on a contract of employment. For example, article 4 of the Employment Relationship Act of Slovenia states that

> 1) An employment relationship is a relationship between the worker and the employer, whereby the worker is voluntarily included in the employer's organised working process, in which he in return for remuneration continuously carries out work in person according to the instructions and under the control of the employer.[257]

[256] Fenwick et al., op. cit., p.10.
[257] Employment Relationship Act of Slovenia, No. 103/2007, art. 4.

In fact, in many former Yugoslavian countries, the factual working relationship, or the act of performing work for pay, is that which determines the existence of an employment relationship, as I will show later. Similarly, French jurisprudence, for example, considers that "the existence of an employment relationship depends on neither on the expressed intention of the parties nor on the denomination which they have given to their agreement but on the factual conditions in which the activity of workers in question takes place".[258]

On the other hand, in order to know which legal rights are given to this category of society, i.e., workers, identification of who is a worker and their coverage in national legislation can be of a great importance.[259] Certainly in different countries labour laws provide for different definitions of the term "worker" or the term "employee", and depending on the broadness or narrowness of this definition certain categories of workers can be included or excluded from the scope of the law's application. Sometimes these excluded types of workers may be covered by other special laws, e.g., public servants, military staff, police officers, etc., while some are not recognized by the law at all although they do exist in practice, e.g., home workers, domestic workers, and the self-employed.

According to Tekle, the traditional coverage of labour law protection was more related to a man as a worker: "the head of a household without childcare responsibilities".[260] This statement, however, can be challenged, as it does not fully hold ground in the countries that previously had a socialist establishment, as there, for example, the state

[258] Freedland and Kountouris, op. cit., p. 53.
[259] R. Benny et al., op. cit.
[260] Ibid.

would usually ensure childcare facilities for everyone—which would make a difference for a working woman. In fact, in the countries whose economies are in the process of transition from a centralized economy towards a labour market economy, the changes in labour market institutions and regulations have modified the working life of women, with the ultimate effect of creating an additional burden upon them. In the pre-transition era, women performed long hours of unpaid work at home in addition to their paid contribution in the labour market, and this dual role had an important effect on women's labour market opportunities. But, during the transition process, the labour market has changed from a very formal one heavily centred on public employment to one that is extremely polarized. At the same time, the burden of parental duties, especially childcare, has been transferred more and more away from the state and onto the household. As a consequence, new duties for women have arisen. They have to rethink and be innovative in their life decisions, such as how much to invest in education and when to start a family. As Gosh noted,

> We have thus observed, in the space of less than one generation, massive shifts of women's labour into the paid workforce, especially in export oriented employment and then the subsequent ejection of older women and even younger counterparts, into more fragile and insecure forms of employment, or even back to unpaid house-work. Women have moved—voluntarily or forcibly—in search of work across countries and regions, more than ever before".[261]

The employment relationship cannot be observed and studied outside of the categories that determine it, some of which are mentioned above.

[261] J. Gosh, p. 1, „Capital flows, changing patterns of work and gender migration: Implications for women in China and South East Asia", *Indian Journal of Labour Economics*, Vol. 46, No. 3, 2003, p. 1.

In this chapter I will present views on the regulation of the employment relationship and try to introduce this very broad topic in law, and will finally present the case study of Montenegro. In this country, due to labour law transplants that occurred as a consequence of the political will for the creation of a new legal and economic system, the form of the employment relationship has undergone changes in the last decades.

3.1 Regulating the employment relationship

Regulation of the employment relationship takes different forms and has a different scope of application in different countries, although some scholars seem to agree that the contract of employment is a typical way of its regulation.[262] However, there are scholars who consider the employment contract to be the expression of unequal bargaining power on the side of workers and employers or "that a contractual framework obscures more than the inequality of bargaining power between the parties – it also obscures the proprietary basis of the exchange".[263]

Because of employment contract's main characteristics, some consider that classical Roman law, *locatio conductio operarum* and *locatio conductio operis*, can be found as a predecessor of the employment contract in civil law jurisdictions.[264] In the Roman period, however, work in exchange for money was not considered as an honorary occupation, since in this manner free people would be equalized with slaves.[265] This attitude changed in the Middle Ages. Here in the preindustrial society the employment relationship developed in the circumstances of the closed economy and patriarchal

[262] C. Mummé, "Property in Labour and the Limits of Contract" forthcoming in *The Handbook on Political Economy and Law*, U. Mattei and J. Haskell (eds).
[263] Ivi, p.1.
[264] Kovacevic, *Pravna subordinacija u radnom odnosu i njene granice*, Beograd, 2013.
[265] Ibid.

society.[266] As explained by Kovačeivic and also by Deakin, at the beginning of the twentieth century the principle of subordination was still in the heart of the employment contract.[267] This was a "sort of counterbalance of the employers' responsibility for the risks at work, as well as the risks related to the occupational safety and health, security of income and security of employment."[268]

While the principle of subordination in the contract of employment was supported by a number of regulations in European countries, in 1900 the term "contract of employment" was mentioned for the first time, in the Belgian law on an employment contract from 1900,[269] then in France in a law from 18 July 1901, then in the Netherlands in a law from 13 July 1907. Switzerland regulated the employment contract for the first time in a law from 30 March 1911[270]; it was then regulated in Italy with laws from 1907 and 1924, in Germany in laws from 1913 and 1919, in Denmark in a law from 1921,[271] and in old Yugoslavia, under the term "service contract", in a law from 9 November 1932, No 262 – LXXXI in article 207. [272]

However, in the civil law systems there were differences in regulation of the employment relationship between French and German systems of origin. As well put by Deakin,

> In systems coming under French influence, the law assumed that the state had the power to regulate basic conditions of work. The idea of ordre public social signified a set of mandatory conditions written into the employment relationship. The law, in recognizing the employer's unilateral powers of

[266] Deakin, op. cit., p. 13.
[267] Ivi, p. 47.
[268] Kovacevic, op. cit., p. 59.
[269] Loi du 10 Mars 1900 sur le contrat du travail, Moniteur belge du 14 mars 1900.
[270] Loi Federale du 30 mars 1911 completant le code civil susse.
[271] Deakin, op. cit.
[272] Kovacevic, op. cit., p.59.

> direction and control within the organisational structure of the enterprise, also undertook the responsibility for protecting the individual worker; the employee was thereby placed in a position of 'juridical subordination'.[273]

In contrast to this,

> In systems influenced by the German code, the contractual character of the employment relationship was qualified by a 'communitarian' conception of the enterprise. The German law concept of the 'personal subordination' of the worker implied their 'factual adhesion to the enterprise' ('Tatbestand'), a process conferring upon the individual 'a status equivalent to membership of a community.'[274]

As already shown in the second chapter of this thesis, the individual employment relationship in England was developed only in the 1970s with the development of employment protection legislation. And as stated by Collins, Ewing and McColgan, "compared to other European countries, the common law of contract developed by the judges accorded almost complete flexibility, subject only to the restraint of trade doctrine and general rules against enforcement of illegal contracts".[275]

What is common to however to these two legal systems is that with the development of the modern employment relationship the terms of the contract began to reflect in some way the essentiality of the "mutuality of obligation, namely the promise to perform work in return for a promise to pay wages".[276,277]

[273] Deakin, op. cit., p. 13.
[274] Ibid.
[275] H. Collins, K. D. Edwing, A. McColgan, op.cit., p. 70.
[276] Ivi, p. 75.
[277] There is a huge corpus of topics that regulate or have an impact on the regulation of the employment relationship and industrial and labour relations, and only some of these topics are: non-discrimination, equality of pay for the work of equal value, minimum wage, working time, occupational safety and health, social protection.

In different countries, however, legislators responded differently to framing the employment relationship. As noted by Mummé, "In some countries, for example, employment is primarily regulated through specific legal regimes which either impose terms, rights and obligations between the parties, or create processes and procedures for collective bargaining of employment rights and responsibilities".[278] On the other hand, "in other countries, such as the United States, Canada, and England, a core contractual common law model of employment law occupies a central regulatory role, which is supplemented by various statutory regimes which are not highly integrated with that common law model".[279]

Throughout the course of history labour law underwent changes and reforms as the system of production changed in countries and at the global level, and also with the rising awareness of human rights and international labour standards which form part of them. This affected and had its consequences on the creation and regulation of the employment relationship.

Freedland and Kountouris note that changes in the regulation of the employment relationship in different national legal systems and in different contexts of the legal system itself have left consequences on the character of the regulation.[280] They observe that:

> in a legal system where personal work relations in general or at least some kinds of personal work relations have, over time, been the subject of extensive and multifaceted regulations, there will have been many different acts of legal construction of those regulations – many exercises in linking legal character

[278] Mummé, op. cit., p. 1.
[279] Ibid.
[280] Freedland and Kountouris, op. cit., p. 7.

> with legal consequences – each taking place in its own regulatory context and constituting its own micro system.[281]

The micro systems to which Freedland and Kountouris refer are created because of the reforms on this topic in law that occurred over time in many European systems[282]: "it therefore further follows that the legal construction of personal work relations will have resulted in the formation of a great multiplicity of micro-systems existing in a great multiplicity of regulatory contexts".[283]

This approach can be related to Sacco's view that is incorrect to assume the unity of legal rules within a given legal system.[284] As Sacco noted, it is not the case that "in a given country at a given moment the rule contained in the constitution or in legislation, the rule formulated by scholars, the rule declared by courts, and the rule actually enforced by courts, have an identical content and are therefore the same".[285] Therefore it also follows that the employment relationship is composed of the legal formants as a basic architecture.[286]

As previously mentioned, there are scholars who consider that path dependence of law can determine the success or the failure of a legal transplant. Hence the law regulating the employment relationship is also path dependent.[287] As stated by Freedland and Kountouris,

[281] Ibid.
[282] Ivi. p. 8.
[283] Ibid.
[284] Sacco, op. cit., 21.
[285] Ibid.
[286] Freedland and Kountouris, op. cit., p. 50.
[287] Ivi, p. 9.

> the legal construction of contract of employment as giving rise to obligations of mutual trust and confidence was also path-dependent upon a certain set of developments in the concept of "constructive dismissal" which were occurring in the context of the law of unfair dismissal – so this crucial development of the sub-system of labour law which we think of as "the law of the contract of employment" was heavily dependent on the contemporaneous emergence of a new subsystem of "the law of unfair dismissal", those two subsystems being considerably but far from completely interesting ones.[288]

Path dependency in this regard means that the employment relationship in legal analysis is also dependent on institutions, their settings and their behaviour—having in mind here the institutions that govern and regulate the labour market.[289] Freedland and Kountorous state that "the legal analysis of personal work relations in a given legal system will tend to have been shaped and determined, to a greater extent than is generally understood to be the case, by the operation of practices or ways of thinking which have institutional standing and are embedded in labour market structures and in the legal system itself".[290]

This also means that the enforcers of the law, as much as the legislators, shape the path dependency of an employment relationship and all the rights and duties that derive from it, as in fact they also do create the influences in the path in all legal systems. The problem arises when there is a high degree of disharmony between the legislative and institutional support for the regulation, and this of course affects the shaping of the subject matter in law.

On a similar note, as I discussed in the part dedicated to Otto Kahn-Freund and noted in his analysis and later writings, he was concerned that there is a disharmony between the

[288] Ivi, p. 10.
[289] Ivi, p. 46.
[290] Ibid.

law and practice on the contract of employment in England. The importance of the tribunals in this regard will be noted in the part of the thesis that examines the case study of the employment relationship in Montenegro.

Among different countries and legal systems, the regulation of the labour market and industrial relations differs. This is why also transplanting laws in these contexts is sensitive and usually their full adaptation takes time. As noted by Levine and Ohtsu:

> Industrial relations analysts have long recognized the complexities of labor relations. They involve large numbers of interrelated rules and customs placed into effect, often after protracted negotiations, by employers, workers and their unions, and government bodies under the influence of dynamically changing economic, technological, political, and social constraints. It is not likely that a practice plucked out of context from one country will readily fit in another. The likelihood is even less when the practice is shorthand for a whole set of interrelated behaviors.[291]

On a similar note, Freedland and Kounouris point out that every legal system has its own ordering of the sources of regulation, while "that distinctive approach forms an identifying characteristic and formative part of its system of labour law within a national legal system as a whole".[292] For example, in civil law systems we may say that, in contrast to the English system, countries structures the labour law sources according to a strict vertical hierarchy of sources.

> In Germany, Italy, France, and Spain, the regulation of the contract of employment is defined by an orderly cascade of collectively agreed norms, statutory rules, and constitutional principles, on the basis of the general principle that every level of regulation below is only able to derogate *in melius*

291 S. B. Levine, M. Ohtsu, „Transplanting Japanese Labour Relations", *Annals of the American Academy of Political and Social Science*, Vol. 513, Japan's External Economic Relations: Japanese Perspectives (Jan., 1991), pp. 102-116, p. 104.
[292] Freedland and Kountouris, op. cit, p. 59.

> – that is to say, broadly speaking, in a more worker-protective fashion – from the level above.[293]

In civil law countries in Europe, the constitution is generally the main and primary source of regulation, follow by the labour law, and then acts, statutes and collective agreements at different levels. Normally, in this case, collective agreements cannot provide fewer rights then what is stipulated in the law, and law cannot provide fewer right compared to the constitution. However, there are differences in the civil law system in the regulation among different countries on the "aspects of formation, content, performance, and termination (of employment)".[294] In contrast to the continental European systems, in England, as pointed out previously, "the statute, collective bargaining, and the contract of employment as shaped by common law reasoning have traditionally been far less integrated than in continental European systems".[295]

However, it is possible to find some mutual patterns in all systems,[296] and this is also one of the principles of the ILO's work, which consists in, among other, global standard setting for the work related regulation.[297] In line with this, Freedland and Kountouris argue that examining the sources of labour law regulation in a national context can help us understand and can affect our understanding on the regulation of

[293] Ivi, p. 60.
[294] Ivi, p. 61.
[295] Ivi, p. 72.
[296] Ivi, p. 57.
[297] S. B. Levine, M. Ohtsu, op. cit., p. 104.

the employment relationship and they try to group these sources, for all legal systems.[298]

They propose the following sources of employment law for civil and common law systems in Europe[299]:

1. Norms that appear to be agreed upon by worker and employer, or the business; however these are typically imposed by the business or industry, and can be regarded as an internal regulation of a firm.
2. Norms that are the result of collective bargaining between workers' and employers' organizations, at any level of operation, and which can constitute a collective agreement.
3. Norms as outcomes of national legal systems, at any level on the hierarchy list of regulation.
4. Norms that derive from supra-national legal systems such as the EU or the ILO.
5. Norms as the result of jurisprudence, case or judge-made law.
6. Norms as the result of legal treatises or doctrines in the continental Europe.

3.2. Case study of Montenegro

In this section I will present the case study of Montenegro, where, starting in 1990, the creation of an employment relationship also introduced the contract of employment. Moreover, the change in the regulation of the employment relationship was accompanied by a broader change in the regulation in general of the labour market and its institutions and mechanisms.

[298]Freedland and Kountouris, op. cit. p. 58.
[299] Ivi, p. 97.

It should be noted that as one of the republics of the former Yugoslavia, Montenegro had the same or similar regulation with regard to employment and labour as all other former Yugoslavian countries while being part of the Yugoslavia. In the Yugoslavian system there was the presumption that the employment relationship exists, that is to say that with the act of factual employment one creates an employment relationship.[300] This is an important point, since this presumption still currently exists in the Montenegrin system.

In the period before 1990, and until the new forms of employment emerged and were regulated, any form of employment relationship—with regard to the most important rights—was considered the same in law and in practice. Here in particular the emphasis is on the most important rights deriving from the social security system, such as pensions, healthcare and unemployment insurance.[301] Thus, in the former Yugoslavian system, the rights to social security were an integral part of the rights based on labour relations.[302] Therefore the act of employment was related to social security and by common sense to the employment relationship as well.[303]

3.2.1 The establishment of the employment relationship in Montenegro

It is worth mentioning, however, that the countries that formed Yugoslavia in 1918 had their own legal traditions, customs and laws. In these countries prior to 1918, labour relations were regulated by civil codes (Montenegro, Bosnia and Herzegovina,

[300] V. Brajic, Radno pravo, radni odnosi, drugi odnosi rada i socijalno osiguranje, Savremena administracija, Beograd, 2001 p. 12.
[301] Ivi, p. 13.
[302] Ivi, p. 13.
[303] Ivi, p. 14.

Dalmatia, Slovenia and Istria, Croatia, Slavonia and Serbia),[304] and besides these also with commercial laws, mining laws and laws on activities.[305]

In Montenegro however, prior to 1918, there was no specific regulation of the contract of employment, though some regulation of labour relations existed as previously mentioned, in the General Property Law (Opsti Imovinski Zakonik) from 1988[306] and in the Commercial Law from 1910 (Trkovacki zakonik). The 1910 Commercial Law of Montenegro, among others, established that merchants are the people whose primary or, as the law states, "usual" occupation is commerce (article 1 of the law). In order to engage in this activity, the law required that persons must be of an adult age (21 years old). The law also prohibited women from working without their husband's permission. Relying on article 638 of the General Property Law, the Commercial Code further states that boys and girls may trade (from the age of 18 years), but require the permission of the father or the guardian, and in both cases the approval of a competent court is required (article 2). The Commercial Code also talks about the registration of companies, ordering the mandatory application of the company (article 5).

The regulation of workers' protection and insurance was established (only for one part of the Montenegrin territory) when in 1918 Montenegro become part of the Kingdom of Serbian, Croats and Slovenians. In that period the constitution of Serbia was

[304] Ivi, p. 35.
[305] Ibid.
[306] Ibid.

enforced in Montenegro together with all Serbian laws, which included, among others, the Serbian Law on Actions from 1910.[307]

It is important to note that some of the articles of the 1910 Law on Actions clearly show that, prior to 1957, the employment relationship was being developed like in most other European civil law counters and was on a path that would eventually create the labour market, which protects the private property. For example, the 1910 law regulated the "supporting staff" (*pomoćno osoblje*) and, as interpreted by Milenkovic, the legislator here had in mind all labour forces employed in the private sector.[308]

The employment relationship, according to the 1910 law, was based on a written contract of employment, normally with a duration of one-year, and the law also contained articles on the termination of employment at the initiative of the employer or the worker.[309] The law prohibited night work for women and in general the work of men younger than 18, and it also regulated the maximum duration of working time.[310] The protection of women and the regulation of working hours arrived later, but still it represented the clear influence that regulation in England had on continental European regulations. In England, for example, the working time of women and children was first regulated in 1804, and the first law on the minimum age for employment was created in 1816, while in France the minimum age for employment was regulated later, only in 1841, and in Germany in 1939.[311]

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[307] T. Milenkovic, *Privremeno Radnicko Zakonodavstvo u Jugoslaviji 198-1929*, Zbornik zavoda za povijesne znanosti istrazivackog centra Jugoslovenkse akademije znanosti i umjestnosti, 1981, p. 225.
[308] Milenkovic, op. cit., p. 12.
[309] Ibid.
[310] Ibid.
[311] Brajic, op. cit., p. 25.

The process of creating unified laws for the whole territory of Yugoslavia began in 1921, with the Law on Labour Inspection from 1921, the Law on Workers' Protection from 1922 and the Law on Workers' Insurance from 1922.[312] In 1931 the Law on Activities was passed, and it was in force in all Yugoslavian territory. The law from 1931 was in force until the beginning of the creation of new type of socio-economic society and until the Law on Invalidity of the regulations passed before April 1941 was brought.

3.2.2 The employment relationship in Yugoslavia during the socialist period

The first post-war Yugoslavian Constitution from 1946 did not contain the article on the right to work, only on the obligation to work.[313] It stated in article 33: "Every citizen has a duty to work in accordance with its abilities; who does not contribute to the community cannot receive from it".[314]

What followed was the:

> development of labour law which supports the concept of the self-governing socialism, thus a particular kind of socialism - a process that started in 1950 with the Basic Law on Management in State Business Enterprises and Higher Enterprises by Work Collectives, and has been incentivized with the Constitutional Law on Basic Principles of Social and Political Structure of Yugoslavia and Federal Authorities, which formally guaranteed the right to work (and abandoned the principle of the obligation to work) – which had its influence on the Law on Labour Relations from 1957.[315]

[312] Ivi, p. 35.
[313] Ivi, p 44.
[314] Constitution of the Federative People's Republic of Yugoslavia, January 31, 1946, art. 33.
[315] B. A. Lubarda, *Uvod u radno pravo sa elementima socijalnog prava*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2013, p.66, personal translation.

The 1953 Constitutional Law transformed the Yugoslavian economy into a self-governing society. The Yugoslavian Constitutions from 1963 and 1974 contained the articles on the right to work but not on the obligation to work.[316]

In the years of socialism during Communist party rule in Yugoslavia, the development of labour relations, in line with civil law European countries' practices at the time, as mentioned above, was abolished. However, in contrast to the USSR's labour relations and labour relations of other socialist systems at the time, the socialist system of Yugoslavia was more moderate. One of the reasons for stating this is that, among other things, the contract of employment and collective agreements were not completely abandoned, but were however marginalized.[317] Nevertheless, these individual employment contracts as well as the collective agreements did not contain all elements of the contract, but rather represented, as Brajic states, "orchestrated acts without full contract content, or completely without it".[318]

There were some other elements as well that made Yugoslavian socialist society different from other socialist countries. Some scholars point out that among all the reasons for this, the self-management model of Yugoslavian socialism was one of the main differences in this regard.[319] Apart from this, Yugoslavia was also "an exception to this socialist world of full employment"[320], or rather a socialist world that would not admit the existence of unemployment.

[316] Brajic, op. cit., p. 37.
[317] Ibid.
[318] Ivi, p. 27.
[319] Ivi, p.37.
[320] S. L. Woodward, Socialist Unemployment, The Political Economy of Yugoslavia, 1945-1990, Princeton University Press, New Jersey, 1995.

As Woodward puts it, "the leadership of the Communist party acknowledged officially in 1950 that unemployment could exist under socialism".[321] According to a theory developed in 1958 and accepted in the 1980s, the unemployment rate that existed at that time was due to the "country's system of decision making and labour-managed firms (called worker self-management) (that) gave employed workers too much power over the share of net profiting going to wages".[322] Woodward provides the figures[323] for the unemployment rates in Yugoslavia from 1964 to 1972, which make a division between net rates (domestically unemployed only) and gross rates (both domestically unemployed and those registered as working abroad). The data show that while domestic unemployment remained quite stable throughout the years, the number of Yugoslavian citizens working abroad increased steadily in all these years. While on the one hand this seems to suggest the increasing, though hidden, role of unemployment in the Yugoslavian economy, on the other hand one should consider that it is not straightforward that all those people working abroad would necessarily have been unemployed in Yugoslavia. In some cases they might have chosen to work abroad because of higher salaries, for example.

Another particularity of the Yugoslavian system is that with the Constitution from 1974[324] labour relations have been based on a conception of a "joint work" (*udruzni rad*). Prior to 1974, the Constitution from 1963 regulated the employment relations, "determining the unique socio-economic position of all working people."[325] Then in

[321] Ivi, p. 4.
[322] Ivi, p. 5.
[323] The table is displayed in the Annex IV.
[324] The 1974 Constitution also decentralized decision-making process in Yugoslavia.
[325] Brajic, op. cit., p. 41.

1965 the Basic Law on Labour Relations introduced collaborative labour relations. Thus, this law created "the collaborative working relationship that is established between the workers themselves organized (joint work), so as an impartial relationship of workers who work together (they merge or join the work) and who self-manage socially owned property and receive the income on the basis of operating results".[326]

After the 1974 Constitution, the Law on Joint Work was passed in 1976, and it defined the employment relations as "relations among workers in basic organization, or working community, where workers, in exercising their right to work with social means, create in joint work with social means and determine by self-regulatory general acts which are the individual and collective rights, duties and responsibilities, in line with the Law." [327]

It is clear, then, that the employment relationship was established among workers and not between the worker and the employer.[328] Moreover, this employment relationship was established among the workers, who not only join their work in this collaborative working relations but also self-govern and determine rights, obligations and responsibilities.[329]

Although one of the aims of the communist system was full employment (an aim of all political systems, after all), unemployment existed, and as previously shown, it was also acknowledged by the Communist Party at the time. However it was largely kept

[326] Lubarda, op. cit., p. 66.
[327] The Law on Joint Work, 1976, art. 161, my translation.
[328] Brajic, op. cit., p. 125.
[329] Lubarda, op. cit., p. 67.

under control because Yugoslavian nationals were allowed to travel and work in Western Europe.

In the above-described conditions, from 1941 to 1989 the employment contract was, in practice, abandoned as a form and the employment relationship was formed in the public sector by decision (*rješenje*) until 1989. In contrast to the contract of employment, in the decision there was no formal requirement of consent on the part of the worker in the sense that it was not required for the form to be signed by the worker. Thus the legal basis for the establishment of the employment relationship was the decision of the self-governing body—the workers' council—and "the chosen worker's duty was to issue a statement before taking the position declaring that he or she is introduced with self-governing agreement on workers' joint work".[330] The worker had the right to appeal in case he or she was not satisfied with the decision.

The absence of the contract of employment was justified by the Communist Party's position towards subordination in the employment relationship and in general with a view according to which the employment contract is a bourgeoisie instrument of the labour market. These were also the primary reasons for abolishing the employer's role in this employment relationship. In reality, these acts helped the state to establish full control over its economy and production.

[330]Ibid.

3.2.3 The re-introduction of the employment contract in Montenegro

The situation described above started to change in 1989 when the new Yugoslavian government passed the Law on Basic Rights from Labour Relations. In this period, with the change of the communist government, all Yugoslavian republics created their own labour legislation.

The 1992 Constitution of Yugoslavia was based on a concept of market economy and it marks the starting of a period of transition from the self-governing socialist model of economy to the market-based one. Ficher et al. describe well the situation in the former Yugoslavia:

> At the time the transition began, there was thus little direct experience of the process of economic transformation, and those advising on and designing the reforms had to draw on general principles and related experiences--the lessons from structural reforms in developing countries in the 1980s and earlier, the experience of China since the late 1970s, and previous reform efforts in the transition economies themselves.[331]

Up until the present date, a number of scholars have investigated the relationship between the failure of communism, the process of economic transition, the revolution of liberalism in Southeast Europe and the transformation of labour rights. Most of them agree that historical changes, wars and revolutions in economic systems contributed to the development of the quest for nationality in these countries, but also contributed to to the poor development of social rights, in particular of labour rights.

In this environment labour legislation has changed constantly since 1992 with a view to modernizing it and adapting to the needs of the labour market, and mostly with the aim

[331] S. Ficher, R. Sahay, C. Vegh, „Stabilization and growth in transition economies: the early experience“, IMF, *MPRA Paper* No. 20631, 1996. p. 8.

of legal harmonization in the process of joining the European Union. Pistor et al. use the phrase "legislative tornado" to describe the amount of transplanted norms and legal reforms which occurred since 1990s.

However some scholars point out at the unpreparedness of many actors advising on the reforms despite the fact that the transition which occurred at the time was not the first of its kind. In fact, as noted by Pistor et al, the technical assistance with bringing new laws to Latin America, Africa and Asia was firstly launched after the II World War, by the US legal scholars.[332] This first law and development movement was however then proclaimed to be a failure in 1974, by the main actors of the technical assistance process.[333] Now in the 1990s there was again a need for the technical assistance in the Eastern Europe and former Soviet Union. Pistor et al note that during this period, called by some the second law and development movement,

> This proved essentially a repetition of the first movement: legal experts, including scholars and practitioners, swarmed formerly socialist economies with constitutions, codes, statutes and regulations. This time advisors from the United States faced stronger competition from Western Europe in comparison with the first law and development movement. Proponents of the German or Dutch civil codes, Americal corporate law, European corporate law, harmonization directives… marketed the value of Western law to their counterparts in the East, backing their campaign to transplant their home legal system with financial aid promises and/or the prospect of joining the EU.[334]

In the newly created situation, the contract of employment has returned as the main regulator of the employment relationship and with it the status of employers in the law

[332] D. Berkowitz, K. Pistor, J. F. Richard, „The transplant effect", American Journal of Comparative Law, Vol. 51, 2003, p. 163.

[333] Ibid.
[334] Ibid.

and practice. The new regulation, and in particular the emergence of the new forms of the contract of employment, based on the models of developed labour market economies, created constantly new situations to which all actors in the labour market had to adapt and act accordingly. Moreover the situations created as a result of new individual and collective labour regulation, have contributed to the establishment of trade unions and employers organizations, and emergence of social dialogue. In addition freedom of association has been granted at the constitutional level.

Parallel to this the new labour law regulation, both collective and individual, which is constantly changing and adapting since 1990s, tends to create enabling conditions for the development, as previously mentioned, of the labour market economy, and also more flexible working relations. Yet, in the present conditions, some scholars point out that the rights of workers have been poorly protected and this is perhaps because the capacities of their representatives, trade unions, are not developed enough. According to Upchurch, there are structural and agency factors of contribution in the above mentioned sense. Structural factors that have contributed to the poorly developed capacities of trade unions are related to the political and economic goals of the ruling elite, which are related to the creation of a free market and the creation of enabling regulatory conditions that would support desirable outcomes. The influence of IFIs is another structural factor that can be considered in correlation with what has was written previously in Chapter II. Agency constraints, according to Upchurch, are ideology and past legacy.

Here is his explanation:

Structural factors[335]

State economic strategy	"Neo-liberal orthodoxy pursued as State strategy has been invoked in an effort to clear out 'rigidities' in the new market economies. In its 'shock therapy' version, this has often meant an early collapse of many market inefficient organisations within the productive sector, and an emphasis on privatisation and labour market de-regulation. This has placed unions (read workers) in a very defensive position, arguing primarily for privatisation but with the retention of social safety nets."
International financial institution conditionality	"Weak internal capital accumulation has entailed the enlisted support of international financial institutions (IMF, World Bank, EBRD, USAID, etc.) in granting loans and grants. The attached 'conditionality' reinforces market imperatives and negatively affects social welfare payments. Gowan refers to the 'Faustian' nature of the international financial institutions in re-casting economic and social priorities, while Gradev has labelled the IFIs as a 'fourth actor' in terms of their ability to shape and reform employment relations regimes in transformation states (Gowan, 1995; Gradev, 2001). Upchurch (2006) refers in particular to the 'positive asymmetric power' of the international financial institutions, under whose influence the interests of organised labour have been effectively excluded from the transformation process."

[335] Upchurch, op.cit., p. 45.

Agency constraints on trade unions in transformation[336]

Ideological fragmentation of unions	"Trade unions have fragmented ideologically and politically under post-Communism, with the main division emerging between the old 'official' unions and newly independent unions (Smith and Thompson, 1992; Thirkell et al, 1998; Pollert, 1999). This has added to union weakness both in industrial and in political ways. Industrially, unions have not been able to present a united front to employers while, politically, they may align themselves with different and sometimes opposing political factions and parties."
Legacy of Communist past	"Trade unions have been claimed to suffer from societal 'weakness' due to negative legacy from the past, whereby popular trust in unions is constrained by their association with the old Communist regimes (Ost and Crowley, 2001). It is also recognised, however, that mistrust is apparent with other civil society organisations (Howard, 2003), and leads to problems of (re)creating effective 'civil society'. Frege (2002) suggests that unions have sought alliances with employers (as they did under Communism) rather than develop autonomy and independence."

In this atmosphere, the transition process in Montenegro, had different effects on the actual reality, as among other, the capacities of institutions enforcing the constantly changing laws were weak in reply to these changes, which is to be expected. Pistor et al observe that:

[336] Ibid.

> "The most common complaint is that while the transplanted law in now on the books, the enforcement of these laws is quite ineffective. In fact empirical analysis suggests that there is little correlation between the level of legal protection afforded by statutes on the one hand and measures for the effectiveness of the legal institutions on the other".[337]

One of the major examples in this regard is related to the informal employment in the country. As the transition contributed to the development and expansion of the private sector, it has also contributed to the rise in informal employment. The data found by the ILO state that prior to the transition, the share of informal employment was at around 5% of GDP, while in 2010 it represented 22.6% of overall employment.[338]

With the changing atmosphere of the labour market, the changing regulations and legal system and expansion of private business, the Montenegrin institutions also had to adapt in order to provide for the effective enforcement of the laws. As stated previously, during the period of the self-governing socialist system, the opinion of the courts and of the legislators was that there is a presumption of the existence of the employment relationship. This is also the case today, as the court is of the opinion that whenever there is a factual working relation, there also exists an employment relationship from the moment the worker started performing the job. This is also supported by the Labour Law, which states that:

> "If the employer with the employee fails to conclude a contract (of employment) in accordance with paragraph 1 of this Article, it is considered that the employee has an employment contract of indefinite duration, which

[337] D. Berkowitz, K. Pistor, J. F. Richard, op. cit., p. 165.
[338] C. Mihes at al, „A comparative Overview of Informal Employment in Albania, Bosnia and Herzegovina, Moldova and Montenegro" , *ILO Decent Work Technical Support Team and Country Office for Central and Eastern Europe*, Budapest, ILO, 2010.

> starts on the day of commencement of the work, if the employee accepts employment."[339]

Quite in contrast with the regulation, which explicitly considers any factual working relation as an employment contract and hence formally excludes informal types of work, with the development of the legal conditions for the expansion of the private sector, Montenegro experienced an increase in the level of informal employment.

However, a rather peculiar feature of this recent phenomenon is that in the country there are no court rulings on the determination of the existence of the employment relationship for the cases in which the contract of employment does not exist, but the factual working relationship instead does exist.

Therefore, as in the self-governing socialist period, the presumption of the existence of the employment relationship still exists, as long there is a factual working relationship. However, in reality such regulation has not prevented the increase of the number of disguised forms of working relationships, such as those without a contract of employment. In this new situation, although they were given legal instruments, the national courts were not able to apply them, thus creating a bypassed situation.

This specific case provides a good example of what can possibly occur when legal institutions are not well connected with law. According to Kahn-Freund's theory, this factor plays an important role in determining the successes of legal borrowing.[340] The case of Montenegro shows that Kahn-Freund's theory, according to which institutions may lack the intellectual capacities to apply the legislation of their own country (when

[339] Labour Law, No 49/2008, 26/2009, 59/2011 i 66/2012, art. 22.
[340] O. Kahn-Freund, On uses and Misuses of Comparative Law, op. cit.

this is in contrast with common practice), is indeed relevant and should be taken into account whenever legal transplants are considered.

Conclusions

The aim of this thesis was to examine the development of the legal transplants theory and apply it to the labour law or more specifically to the creation of the employment relationship in the form of the contract of employment in Montenegro in 1990s.

The study examined the development of the matter in Montenegro, in the light of legal transplants, which is a novelty in itself, as it represents the first study of this kind applied to the Montenegrin case. In the last chapter the analysis and the description focused on the historical period from 1888 until today and have discussed the readiness of institutions to adapt to the new models of regulation of the labour market. It has been presented that not only the legal institutional system in the country has changed through legal borrowing, but the legal borrowing had as a consequence a new political, legal and economic system in a country.

I also provided an overview of legal transplants theories, and I have linked these with labour law-related regulation and labour market creation. The legal transplants theories are divided between scholars who are considered to be culturists, such as Legrand, and those who adopt a more formalistic approach to law, such as Watson. However, other scholars have also adopted a more moderate approach in between these two, such as Kahn-Freund, Mattei, Sacco, Graziadei, Teubner and others. Each one of these three

theoretical perspectives (culturist, formalist and those in between) brings quite different policy implications.

Borrowing in labour law and labour law reforms in general are important both from a rights point of view and from an economic point of view, as they shape the socio-economic realities of individuals and their families in a given system. The right balance between these two aspects should be found, without prescribing a one-fits-all solution. In order to be most effective in these two regards (social and economic) in the field of labour law, policymakers should not adopt a unilateral approach, as this is often the less sustainable one. On the contrary, policymakers should engage all relevant stakeholders of the labour market in the decision-making process. In this thesis I showed that the transition takes more time in the cases in which relevant non-state actors (employers' organizations and trade unions) are weak. Thus an important conclusion is that the labour market should be governed by rules that are previously agreed upon by the representatives of its actors, workers, employers and state. Indeed, labour law is a particularly sensitive area, as it requires the coordination of different state and non-state actors in order to ensure the protection of rights, the balance of powers, industrial peace and economic efficiency and sustainability.

In the thesis I also discussed the role of different supranational actors in regulating the labour market. It has been demonstrated that the perspective adopted by IFIs, according to which some general principles in labour regulations (such as deregulation) are always beneficial for all countries, can be considered as a good approximation of the formalist approach to legal reforms, based on Watson's methodology and that of La Porta. On the contrary it is likely that among developed countries, institutions may be

better able to adjust and react in addressing market failures. Low and middle income countries, instead, when trying to introduce more "efficient" systems of production (through deregulation and privatization) in their institutional and legal systems, may not be able to act quickly and address the problems that typically occur when market failures emerge. As a consequence, the problems related to market failures and market changes might be relatively more relevant when free market-based reforms are introduced in these countries.

The case study of Montenegro described in this thesis provides some interesting contributions to legal transplants theory in labour law. The first contribution consists of the acknowledgment that the law, and labour law in particular, is the product of human interaction and is not an isolated phenomenon. It is not possible to know in advance how much time it will take before the borrowed norms become part of institutional culture, but it is demonstrated that until this happens, no legal borrowing can be fully successful. This process of incorporation of the new norms in the institutional culture will be even more complicated if the changes in the legal and institutional settings occur very often. In Montenegro, the country's labour regulation has experienced systematic and radical changes throughout the years: from the early development of a contract of employment in the 1910s, to its marginalization in the 1950s, to the establishment of the self-governing system in the 1960s and finally with the reintroduction of the employment contract in the early 1990's. This process necessarily created a line of adverse effects and possibly confusion among the law and the implementing institutions.

In this respect, the Montenegro case study provides a new contribution to Kahn-Freund's original idea of the "integration variable", concerning the intellectual capacities of the institutions to implement the law. The Montenegro case shows that Kahn-Freund's theory can be applied not only to a common law country, but also to other countries, independently from its own legal system, whenever there is a gap between the law and the practice. A typical consequence of this gap is that institutions do not intervene even in the cases in which they are entitled to do so, because the new regulation is alien to them.

The second contribution of this thesis is that in most cases less developed countries, and especially those with transition economies, do not intentionally innovate in legal rules, but rather try to catch up with more prestigious legal systems, which they usually take as a model no matter the degree of complementarity between the two systems. However, even if it may seem that tradition can affect only to a small degree the norm—at least the one that is written—on the contrary, this factor will affect to a large extent the actual application and enforcement of such norms and possibly their formulation, even if only the translation is in question.

It is clear that in countries whose legal system collapses, the legislators and the law, as an outcome, are affected by politics during the process of reforms and transition. This is because the main driver of the change is indeed politics, which is trying to create a new socio-economic system, but first needs to create an enabling legal system. This scenario corresponds very closely to what has happened in the last twenty years in Montenegro.

However, even if politics represents the main driver of the change—thus it exists before the law is created in the form of the "will"—it is almost impossible to separate the politics from the people who are actually conducting it. The consequence is that these people are indeed still affected by the tradition and previous social norms in which they operated in past years.

So the three forces—politics as a pressing factor for the creation of the law (the political will) on the one hand, and tradition and law on the other, as three social norms affecting our behaviour mentioned by Mattei—can also be in conflict within one given legal system or in a national context, because the people and the institutions enforcing the norms are under the influence of the environment that shaped them until that very moment. Eventually, this path dependency of norms is, among other, why transition takes time.

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APPENDIX I Legal Origin and Economic Growth

Table 1. Legal origins and economic growth

Average annual per capita growth rate	1870-1913 (1)	1913-1950 (2)	1950-1973 (3)	1973-2000 (4)	1870-1913 (5)	1913-1950 (6)	1950-1973 (7)	1973-2000 (8)
Common law	-0.00081	0.00036	-0.00585	0.01318	-	-	-	-
	(0.00289)	(0.00333)	(0.00937)	(0.00809)	-	-	-	-
Civil law								
English legal origin	-	-	-	-	-	-	-	-
French legal origin	-	-	-	-	0.000043	-0.00078	-0.00354	-0.02112***
					(0.00313)	(0.00319)	(0.00863)	(0.00762)
German legal origin	-	-	-	-	-0.00016	-0.00721	0.06187***	0.03078**
					(0.00427)	(0.00435)	(0.01450)	(0.01279)
Scandinavian legal origin	-	-	-	-	0.00471	0.01403**	0.00645	-0.00670
					(0.00523)	(0.00533)	(0.01823)	(0.01608)
Constant	0.01596***	0.01292***	0.05023***	0.02267***	0.01514***	0.01328***	0.04437***	0.03585***
	(0.00156)	(0.00180)	(0.00523)	(0.00452)	(0.00247)	(0.00251)	(0.00689)	(0.00608)
Observations	48	48	77	77	48	48	77	77
R2	0.0017	0.0003	0.0052	0.0342	0.0202	0.2301	0.2397	0.2289
Adjusted R2	-0.0200	-0.0215	-0.0081	0.0213	-0.0466	0.1776	0.2085	0.1973
F-test of overall significance	0.08	0.01	0.39	2.65	0.3	4.38***	7.67***	7.22***

Standard errors in parentheses. Asterisks denote significance *** p<0.01, ** p<0.05, * p<0.1

Source: Milhaupt, C.; Pistor, K. 2008. *Law & Capitalism*, University of Chicago Press, United States of America.

APPENDIX II[341] Regional Labour Tribunal of the Third Region, Brazil

Regional Labour Tribunal of the Third Region, Rogério Ferreira Gonçalves (1) Infocoop Servíços – Cooperativa de Profissionais de Prestação de Servíços Ltda (2) Caixa Económica Federal CEF (Responsável Subsidiária), 30 September 2003, 00652-2003-017-03-00-0RO

Constitution of Brazil

Article 5

(1) Norms that define fundamental rights and guarantees are immediately applicable.

(2) The rights and guarantees expressed in this Constitution do not exclude other rights stemming from the system and principles adopted by this text or stemming from international treaties to which the Federal Republic of Brazil is a party.

(3) International treaties and conventions on individual rights that are adopted by both houses of the Congress, in two rounds, by three fifths of the votes of the members of each house will be the equivalent of constitutional amendments.

Country:
BRAZIL

A worker carrying out his activity within the framework of a cooperative providing services for a public administration/ Claims of the existence of an employment relationship/ Existence of a link of subordination/ Reference to international law to strengthen a decision based on domestic law

A computer operator had joined a cooperative which provided services for a public administration. Within that framework, he worked for the administration while being paid by the cooperative as a member of it.

Collaboration with the cooperative ended after 20 months. The worker referred the matter to the courts in order to gain recognition that he was in fact linked to the cooperative by an employment relationship, a legal classification, leading to the granting of a certain number of advantages and compensations.

[341] The summary of this Court's decision has been taken from the website of the ITC ILO and the Compendium of Court Decisions, available at: http://compendium.itcilo.org/en

The court of first instance decided in favour of the operator and reclassified the contractual relationship linking him to the cooperative. The cooperative appealed that decision, arguing on the one hand that the operator was a full-fledged member of the cooperative, thus receiving his part of the benefits of that organization and stressing on the other hand that the contractual ties between the cooperative and the public administration were purely civil in nature, and that there was no evidence that there was a dependent employment relationship with the operator.

Before examining the facts of the dispute, the Regional Labour Court considered the article of the Brazilian labour legislation indicating that the members of a cooperative are not tied to it by a contract of employment. The jurisdiction of second instance stressed that that provision had the sole result of creating a simple presumption of an absence of a dependent employment relationship and that it in no way prevented reclassification of the contractual tie linking the member to the cooperative, especially in the event of fraud aimed at avoiding the application of labour legislation.

In order to strengthen its interpretation of the labour legislation mentioned above, the Regional Labour Court referred to ILO Recommendation No. 193 on the Promotion of Cooperatives. After having quoted paragraph 8(b) of that instrument,[2] the Court said the following: "Thus, while promoting the creation of cooperatives, the ILO has shown its concern that that legal instrument not be used to violate workers' rights. In each case, it is necessary to check the way in which the provision of services occurred in order to determine its correct legal qualification."

The Court of Appeal applied that principle to the case in hand and found that remuneration of the computer operator was absolutely no different from that usually paid to an employee and that nothing in the organization of the work done by the operator made it possible to consider him an independent worker.

On that basis, the judge giving the Regional Labour Court's decision declared: "Thus, basing my argument on the legal principles already mentioned as well as on the recommendation coming from the ILO and adopting the same position as the decision of first instance, I reach the conclusion of the existence of a relationship of employment, the conditions of Article 3 of the consolidated labour laws being fulfilled."

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[1] ILO Recommendation on Promotion of Cooperatives, 2002 (No. 193).

[2] Paragraph 8(b) of Recommendation No. 193: "Ensure that cooperatives are not set up for, or used for, non-compliance with labour law or used to establish disguised employment relationships, and combat

pseudo cooperatives violating workers' rights, by ensuring that labour legislation is applied in all enterprises."

APPENDIX III[342] Industrial Court Case, Trinidad and Tobago

Industrial Court, Banking, Insurance and General Workers' Union v. Tri-Star Latin-America Ltd., South West Regional Health Authority, Tobago Regional Health Authority, 23 January 2007, Case No. 74 of 2002

Country:
TRINIDAD AND TOBAGO

Triangular employment relationship/ Constructive dismissal/ Demotion/ Establishment of a jurisprudential principle based on international law

The Banking, Insurance and General Workers' Union, in name of Mr. Hazel, called on the Industrial Court to order the defendants to pay compensation to the worker for their constructive dismissal. The trade union based their arguments on the fact that the worker had been demoted without prior notice from the position of Team Leader in a Pilot Project with operation supervisory responsibilities to the one of Emergency Medical Technician, which also incurred a salary reduction that affected the worker's living conditions. Following three years working in the new job, the worker resigned.

Once the Court had reviewed the evidence submitted by the parties in the case, it concluded that none of the defendants' evidence challenged the evidence submitted by the trade union to prove that there was no justification for the demotion and that the worker had not been afforded the opportunity to know the reasons behind the decision or defend himself against the decision. Moreover, there was no doubt that the worker had suffered a salary reduction and that the defendants' actions were not in keeping with the principles and practices of good industrial relations practices established in the Industrial Relations Act. Based on the above, the Court declared the constructive dismissal to have been proved.

The Court found that the only controversy in the case lay in the existence of an employment relationship between the worker and the defendants, since all of the enterprises involved denied having employed the worker. This point had to be resolved in accordance with Section 10 (3) (b) of the Industrial Relations Act, which establishes that the Court is required to act having regard to the principles and practices of good industrial relations. In this regard, the Court indicated that in so doing, ILO Recommendation No.

[342] The summary of this Court's decision has been taken from the website of the ITC ILO and the Compendium of Court Decisions, available at: http://compendium.itcilo.org/en

198 and other international and local precedents can be considered and applied to the circumstances of the case.

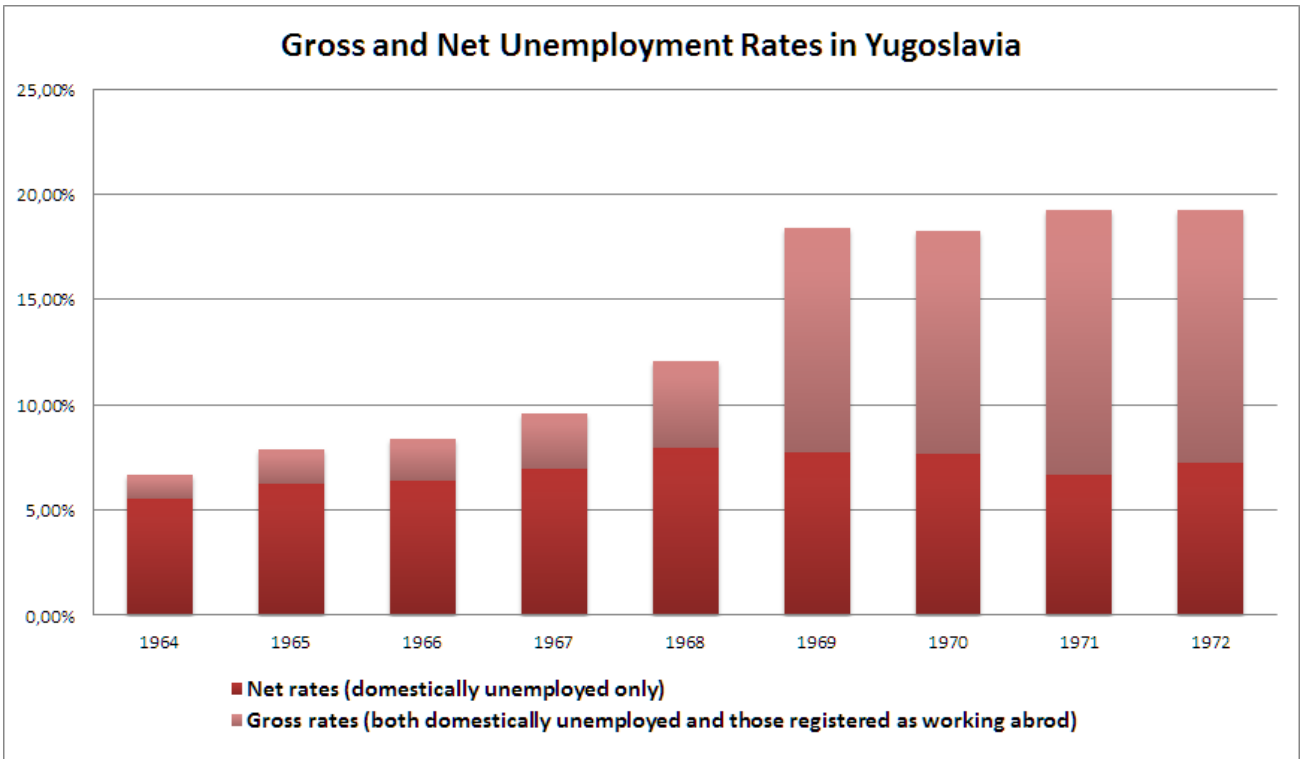
The Court referred to paragraph 9 of ILO Recommendation No. 198 which establishes that:

"the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties."[3]

The Court also highlighted how recommended indicators of the existence of an employment relationship in Recommendation No. 198 are the periodic payment of the remuneration to the worker and the fact that such remuneration constitutes the sole or principal source of income.

Considering all evidence submitted by the parties and "applying current principles of good [industrial] relations practices", including those derived from Recommendation No. 198, it concluded that at the time of the demotion the enterprise that employed Mr. Hazel was Tri-Star Latin-America Ltd., and that this enterprise was the sole employer of the worker. It, thus, ordered Tri-Star Latin-America Ltd to pay damages to the worker for constructive dismissal.

APPENDIX IV Gross and Net Unemployment Rates in Yugoslavia



Source: Woodward, S. L. 1995. Socialist Unemployment, The Political Economy of Yugoslavia, 1945-1990, Princeton University Press, New Jersey.