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Shinyashiki, Emiko
Faculty of Law, Kyushu University : Associate Professor

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ARTICLE

Changing Circumstances in Contracts of Employment, Contract Law, and Employment Legislation in English Law

Emiko Shinyashiki[1]

Ⅰ Introduction

With the expansion of employment via platforms and the so-called 'gig economy' there is a growing need to examine whether it is possible to find a legal relationship between parties in question and whether rights and obligations based on such a legal relationship can be found by relying, in some way, on the traditional concept of the contract of employment.[2] That is why it is necessary

(1) I am especially grateful to the former Court of Appeal judge Patrick Elias, Lord Justice Elias who kindly replied in writing to my questions sent to him in March 2021. This article owes much to my correspondence with him which provides the basis of my account of his views. Also, I owe a large range of debts to my colleagues, especially Mark Fenwick, who has patiently discussed the ideas in this article and commented on earlier drafts. I am grateful to Makoto Ishida for his helpful comments. The responsibility for any errors remains my own.

and important to examine the possibilities and limitations of existing employment legislation and general contract law principles on the contract of employment before introducing any new regulation for these new forms of work.

However, it is not only the applicability and effectiveness of such existing legal regulations that are in question. In the search of answers to these points, the way of understanding or constructing the legal structure and content of the relationship between parties to a contract in the employment field itself becomes an issue, as described below.

The central claim of this article is that, as forms of work become increasingly diverse, important limits to the traditional way of thinking in Japanese employment law are exposed. The limits in Japanese employment law doctrine and case law can be seen when considering the development of the law of the contract of employment to encompass these new forms. In the traditional way of thinking in Japan, insufficient attention has been paid to the significance of the parties' agreement in the constitution of the legal relationship in which the contracting parties stand, as we will see below. It is true that, even in the UK, a situation arises in which there is a rise of various forms of work that are not well connected with the legal regulations whose basis for the application is the concept of a contract, and it is necessary to look back to the contractual relationship between the parties. However, in the UK, these circumstances already led to a review of employment law, both in the academic literature and case law, in which the overall link between the agreement of the parties, the principles of contract law governing the agreements, and employment legislation is explored. Professor Mark Freedland develops the legal conception of the contract of employment as something 'between' agreement and regulation. In considering the function to be performed by the parties' agreement in the field of

（2） In Japan, it has generally been understood that 'contract of employment' under the Japanese Civil Code corresponds to a 'labour contract' under the Japanese Employment Legislation. In this article, therefore, we use the term 'contract of employment' in order to facilitate a comparison with the concept of contract under UK employment law.

labour law, contract law and employment legislation in such an overall review, the difference, in the UK, in understanding can be very instructive for Japanese law.

The article proceeds as follows. Section Ⅱ reviews the background to the discussion, specifically the conventional way of thinking around employment relationships in Japanese and English law. Section Ⅲ reviews how the relationship of rights and obligations between the parties based on the contract of employment is formed in English law and confirms the traditional way of thinking regarding the legal construction of the rights and obligations between parties to the contract of employment. Section Ⅳ then explores the ideas of Mark Freedland and his recent attempt to re-think this issue. Section Ⅴ considers the ideas of a former Court of Appeal judge, Lord Justice Elias, who has pushed back against the arguments of Freedland. Section Ⅵ describes how these arguments have played out in recent case law, including in cases that consider new forms of employment relationship. Section Ⅶ concludes.

Ⅱ The Significance of the Debate in the UK for Japan

This article is concerned with three sets of questions, which are briefly outlined here. These questions are situated in contemporary debates in Japanese labour law.

1 Characteristics and Possibilities of the Traditional Way of Thinking

In Japan, the content of the contract of employment has traditionally tended to be understood objectively. Fundamentally, article 13 of the Labour Standards Act 1947[(3)] stipulates that 'any part' of a contract of employment that does not meet the standards set forth in the Act is void, and that 'the part of the contract that

(3) This Act stipulates the wide range of standards for employment relationship in Japan with criminal penalty as a way of enforcement of the Act (http://www.japaneselawtranslation.go.jp/law/detail/?yo=%E5%8A%B4%E5%83%8D%E5%9F%BA%E6%BA%96%E6%B3%95&ft=2&re=01&ky=&page=1) (last visited on 15/12/2021).

is void is governed by the standards prescribed in this Act.' Therefore, once a contract of employment has been concluded, a worker may, in principle, bring a claim based on the provisions of the Act (for example, a claim for premium wages for overtime work) to the ordinary civil courts.

With such a mechanism in place in Japan,(4) the legal *fact* of the formation of the contract of employment brings about the package of the content of the employment contract or relationship. As a result, the concept of the contract of employment has come to be conceived in an integrated manner with the content of the Act.

Also, as several Acts in the employment law field have been enacted after 1947 and the coverage rate of trade unions had remained at a relatively high level,(5) the space or significance of agreements of parties to a contract in conceiving the content of employment relationship has been latent within the forest of legislative

（4） Furthermore, article 89 of the Japanese Labour Standards Act 1947 provides, 'An employer who continuously employs 10 or more workers shall draw up rules of employment' (so-called 'work rule book') . The 'items' to be provided in work rule books are also raised in the same section, including the times at which work begins and ends, rest periods, leaves, wages, retirement, health and safety. Article 7 of the Japanese Labour Contract Act 2007 stipulates, 'If a Worker and an Employer conclude a labour contract, and the Employer has informed the Worker of the rules of employment [the work rule book] that provide for reasonable working conditions, the contents of the labour contract are to be based on the working conditions provided by such rules of employment' (http://www.japaneselawtranslation.go.jp/law/detail/?id=2578&vm=04&re=02) (last visited on 15/12/2021). Thus, under Japanese law, items contained in work rule books drawn up by employers have the effect of contractual term, and it is possible for an employee to bring an action against his employer in an ordinary court on the basis of the provisions of the work rule book.

（5） Article 16 of the Japanese Labour Union Act 1945 provides, 'Any part of an individual labour contract that contravenes the standards concerning working conditions and other matters relating to the treatment of workers provided in the collective agreement will be void. In such a case, the invalidated part of the individual labour contract is to be governed by those standards. The same applies to particulars the individual labour contract does not prescribe' (http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=02&dn=1&x=43&y=25&co=01&ia=03&ja=04&ky=%E5%8A%B4%E5%83%8D%E7%B5%84%E5%90%88%E6%B3%95&page=6) (last visited on 16/11/2021). Therefore, if a contract of employment has been concluded between an employer and a member of a traded union, and the union has a valid collective agreement with the employer which contains individual rights of union members, such as wages or leaves, the employee may, in principle, bring a claim based on the provisions of the collective agreement to the ordinary civil court.

regulations and collective agreements.(6)

Already twenty years ago, Professor Yuichiro Mizumachi stated that 'in conventional theories and judicial precedents, the tendency of thinking in Japan is first to determine the nature of the contract (which is also determined in an almost standardized manner with standard employment) and then derive the solution to the specific problem from there.'(7) That is to say, there is a line of thinking that first determines the existence of an employment relationship that is likely to be in conformity with the relationship for which the legislation or case law is established to regulate and to leave behind determining the existence of a continuing contract of employment. In other words, based on the general line of thought, the first thing for judges to do has been to consider whether there is an employment relationship from the viewpoint of the content, purpose, or policy of the regulation, which themselves contains the notion of the content of a contract of employment. It may be possible to resolve disputes between parties in question without determining whether the parties have entered a continuing contract of employment and interpreting what they have agreed.

Considering this conventional way of thinking, the first thing that the judges should determine is what kind of relationship the parties have. It is true that, especially in the era when standard employment was common, or in an era when it was not incompatible with constructing a legal relationship between parties to a contract in the employment field based on standard employment, the existence of an agreement between the parties to form a continuous open-ended contract of employment could be assumed as a relatively fixed fact. In such a situation, it was not necessary to discuss the parties' agreement. In that situation, discussions on the legal relationship between the parties in a contract in the employment field could be concentrated on the legal or factual relationship between the parties and its content.

（6） Emiko Shinyashiki, *The Legal Structure of Labour Contract Formation* (Shinzansha, 2016) 4.

（7） Yuichiro Mizumachi, 'The Process and the Law of The Labour Contract' in Labour Law Society ed. *The Labour Contract* (Yuhikaku, 2000) 41, 50; Emiko Shinyashiki, (n. 6) 7 below.

However, the factual premise that allows for the dominance of such a way of thinking has withered in Japan. Non-standard employment and employment patterns such as those of those who work via platforms, which may not even be properly conceived in contrast to traditional employment, have become prevalent to a considerable extent[(8)]. The ways in which people work, whether factual or legal, take on a specific form in the wake of some assumption or arrangement between the parties. Thus, underneath the development of new forms of work, there is a diversification of agreements and contractual arrangements. Indeed, in the field of labour law, a legal relationship in which the parties to a contract stand is not necessarily constituted solely by functions of an agreement of parties. Although the circumstances vary widely in each country, in modern times, many individual rights and obligations are provided by legislation that still presupposes parties agreements or contracts. Given such legislative regulation, it is the function of a parties' agreement to bring about legal rights and obligations that is substantially important. However, as mentioned above, there has been inadequate attention paid to the content and significance of the agreement that forms a contract of employment in Japan. Also, the link between parties' agreements and the legislative rights and obligations has not been adequately theorised in Japan[(9)]. In the absence of such a theory to bring about and keep the link between the parties' agreement and the legal system, the situation will become chaotic if the actual arrangements or agreements between the parties are diversified. This is because, in the first place, there is no well-developed theory to grasp such a new reality legally, and, also, it is not clear how such a situation can be legally regulated.

（8） According to the Labour Force Survey published by the Statistics Bureau of Japan, in the period July-September 2021, the share of non-standard employees in the total number of employees was approximately 37 per cent (https://www.stat.go.jp/data/roudou/sokuhou/4hanki/dt/pdf/gaiyou.pdf) (last visited on 12/11/2021).

（9） Emiko Shinyashiki, 'The Roles of Parties to a Contract, Judges, and Policy in the Sphere of Classification of Contracts for Work in English Labour Law (1)' (2015) 64 (1) *Yamaguchi Keizaigaku Zasshi* (Yamaguchi University) 1.

Thus, in considering the content of the legal relationship between the parties for the future, we are forced to consciously review the conventional way of thinking and to discuss whether it is valid for non-standard employment or new types of work, such as work via platforms. More concretely, it is necessary to examine whether it is possible to grasp and construct the legal relationship between the parties to a contract for work in the future through the conventional way of thinking and to conceive the content of the legal relationship between parties by comparing them with the *standard* employment contractual relationship.

2 The Debate in the UK

When we consider English employment law from the perspective of Japanese employment law, we find a fascinating, on-going discussion amongst academics and the judiciary, which is noteworthy for its practical significance and analytical rigour.

Take the discussion on the determination of the application of employment regulations. First, there is a difference between English law and Japanese law in determining the application of employment legislation. The statute (employment legislation) in English law defines the concept of employee or worker, and, unlike in Japan,[10] these concepts of the legal subject are defined by the concepts of contract; contract of employment or a worker's contract.[11]

Therefore, in determining the application of employment legislation, it has always been a question whether and what kind of contract is formed by the agreement of the parties. Thus, the way of understanding the content of an employment relationship or the connection between legislation and contract law contrasts with that of Japan. Commentators in the UK start their arguments

(10) For example, article 9 of the Japanese Labour Standards Act 1947 provides, 'The term 'worker' as used in this Act means a person who is employed at a business or office … and to whom wages are paid'. There is no additional definition to the concept 'worker' whose legal relationship with his employer is based on a labour contract which is generally understood to correspond to a contract of employment. Then, a person needs to satisfy the two requirements in the article to reach the rights prepared in the Act: employments and wages.

(11) Employment Rights Act 1996 (hereinafter 'ERA 1996'), s. 230 (1)(2).

with a contract or parties' agreement, while commentators in Japan skip the arguments on the parties' agreement but focus, instead, on the legal relationship between the parties or the application of any relevant regulations.

Recently, however, some academics in the UK have indicated that the law of the contract of employment should develop to encompass new forms of work by regarding the common law and the statute law in the employment law field as a unitary mechanism, in expectation of the role of general principles that give rise to the structure of the contract of employment and the courts (common law) that give effect to those principles. As we will see later, the arguments of these academics might be regarded as an attempt to reorganise and reconstruct the contractual relationship in the employment law field, paying attention to the context in which the contract of employment is placed and should be subject to regulations in the present or future. Such a methodology or way of thinking amongst English academics seems to be an attempt to construct the legal relationship focusing on and evaluating the reality between the parties by positing a certain content, character, or structure of contract of employment which is understood from the viewpoint of the social, economic, or legal context. Although it cannot be easily compared with the traditional way of thinking in Japanese employment law, that way of thinking that appears in the ideas of UK academics seems to be similar, in broad terms, to the traditional Japanese way of thinking.

Interestingly, Lord Justice Elias, formerly of the Court of Appeal, who for many years has delivered essential judgments, particularly in the field of labour law, has made strong criticisms of the leading academic arguments.[(12)] The core of his criticism is the clarification of the fundamental role of the English courts in administering the common law, and a caution about the risks to the integrity of the legal system if the judiciary were to exceed the authority traditionally expected of them.

(12)　See Patrick Elias, 'Changes and Challenges to the Contract of Employment.' (2018) 38 *Oxford Journal of Legal Studies* 869.

From the viewpoint of a person who lives in the world of Japanese employment law, the difference in views between the leading academics in the UK and the judiciary concerning the allocation of roles between common law, statute law, and the parties' agreement is noteworthy. It is, of course, necessary to keep the differences between the two legal systems in mind, but such differences in the views of academics and judges can provide a useful perspective for confirming the features in the way of thinking in Japanese employment law.

3 The Concept of Circulation

This article tries to compare and examine the 'circulation' of the legal understanding or construction of the content of relationship of the contract of employment in English and Japanese employment law and highlights the features and problems of the thinking way of Japanese employment law, which might indicate the clues for a solution.

The article uses the term 'circulation' in its comparative study because this term can help us to understand comprehensively the dynamics of the law of the contract of employment and set up a perspective for comparison. Therefore, it is necessary to first to describe 'circulation' referred to in this article. The term 'circulation' as used here refers, in the abstract, to the interaction between the facts or realities surrounding the parties to a contract in the employment field who are the subjects of legal rights and obligations and the institutions in the legal world. At the same time, it also means that the interaction constitutes the legal relationship of the parties standing in a contractual relationship in the employment field and eventually to the development of the law of the contract of employment.

It must be convenient to explain 'circulation' in slightly more detail in the Japanese context. As mentioned above, in current Japanese law, legislative regulations in the field of employment have broadly developed. Also, there are ancillary duties to a contract of employment that are not necessarily based on the agreement of the parties to a contract but are, nevertheless, contractual in nature. They automatically

arise with the formation of the contract of employment. For example, the duty on the employer to care for the safety of their employee in their employment has been accepted and established by the courts.[13] Assuming the situation in which the regulations are crucially important in determining the rights and obligations between parties to a contract, it can be said that the legal relationship between parties to a contract of employment has been conceived by and through legislation and the judge-made principles on the contract of employment, rather than in terms of the parties' agreement itself. In particular, traditionally, in Japan, an agreement between individual parties in determining the content of the contract of employment has not been given much importance.[14] Therefore, it has been argued that, in interpreting the law, the courts should focus on the needs (especially personal subordination) as they appeared in the actual relationship between the parties for the legislative or contractual regulation and examine in detail the purpose and objectives of existing regulations, including principles on the contract of employment and employment legislation. Sometimes, it has been argued so, even, to extend the application of existing legal principles by the technique of analogy.[15] Thus, rights and obligations between parties to a contractual employment relationship have been conceived through the interpretation of the regulation for the contract of employment that gradually delve into and expand the purposes of those regulations, considering the

(13)　Today, it has come to be stipulated by the Japanese Labour Contract Act 2007, article 5.

(14)　The significance of the agreement was obliterated from the starting point of the relationship between labour law regulations and contracts in Japan (Shinyashiki Emiko, 'An Aspect of the History of Work Rule Book and Agreement as Sources of Terms and Conditions of Employments' (2015) 82 (2=3) *Hosei Kenkyu* (Kyushu University) 809; See also Susumu Noda, 'The "agreement" in the Labour Contract' in the same book as (n. 7) 19 and Makoto Ishida, 'The History of Theories on Labour Contract Doctrines' in Tsuneki Momii ed. *The History of Post-war Labour Law Theories* (Roudouzunpousya, 1996) 615-656.

(15)　Article 19 of the Japanese Labour Contracts Act 2007, is a typical example (http://www.japaneselawtranslation.go.jp/law/detail/?id=2578&vm=04&re=02) (last visited on 16/11/2021). Article 19 of the Japanese Labour Contracts Act 2007 deems an employer's acceptance of an offer from his employee to renew the fixed-term labour contract, where he satisfies particular requirements. This is a legal principle formed by judicial precedent, which has been made into an article.

needs of the parties to the relationship being regulated by the regulations.

Notably, the above process of the development in the law of the contract of employment cannot be said to be a process of interpretation of the law alone. There, the development of the law has been brought about not only by the elements inherent in the law. Metaphorically speaking, in that process, circumstances or factual elements outside the law collide with some part of the existing law, subtly changing the shape and orbit of the law and are more akin to a meteorite colliding with a planet. If it is not so controversial, it can be said that the necessary elements in the development of the law consist of the opportunity that is external to the law and the elements of the law that are intrinsic to the law.

Concretely, for example, the duty on an employer to care for the safety of their employees has been approved based on the principle of good faith.[16] The doctrine had been inherent in the law of the contract of employment. However, the occurrence or continuation of particular social or economic situations has led to the legal approval of the duty of care for safety. The existence and significance of the factual and legal elements existing in both the factual and legal worlds begin to have legal significance when each element existing in both worlds begins to relate to each other to a certain extent. Indeed, it is not possible to say which element's existence in either world comes first nor is it possible to make a strict distinction. However, it can be said that when the elements in both worlds are connected, and 'circulation' emerges in which they begin to reveal to each other their significance, and when that circulation is understood and approved as legally solid, the principle of law that expresses as a legal pattern that a certain fact produces a certain legal effect appears.[17]

(16) The Japanese Civil Code 1896, article 1 (2) provides, 'The exercise of rights and perfor mance of duties must be done in good faith.' (http://www.japaneselawtranslation.go.jp/law/detail/?id=2057&vm=&re=) (last visited on 16/11/2021).

(17) See Atsushi Omura, *The Codified Contracts and The Characterisation* (Yuhikaku, 1997), especially 310 below.

In this way, it can be considered that the elements on both sides are gradually developing the law of the contract of employment, feeding back to each other the significance of the factual and legal elements that each element encompasses. In addition, it is the concept of the contract of employment that lies at the boundary of both worlds as a key concept in the field of employment law, like a 'knot' in the circulation that connects both worlds and gives rise to the law as a result while changing its own way of being under the operations of both sides.(18)

4　The Significance of the Debate in the UK for Japanese Employment Law

From the viewpoint of the concept of circulation, the review of the way of thinking in Japanese labour law pointed out above can be understood as a task to reconsider the connection between the world of facts, which contains the development of new forms of work, and the world of law, which consists of precedents and employment legislation. This is because, in this rethinking of the way of thought in Japanese employment law, the question is how the world of facts can be captured by legal concepts and how legal effects can be attributed to those facts.

The same question of how to link facts and legal systems is, in the present times, being asked all over the world in terms of the question of applications of labour law or in terms of the question of the introduction of new regulations for new forms of work. Among them, in the UK, the application of legislation relies largely on the concept of contract under common law, and, under the development of new forms of work, the link between a parties' agreement, contract and legislative regulation is sharply tested. Furthermore, as mentioned earlier, academics and judges are debating how to position the significance of the agreement between the parties from the viewpoint of common law and statute law in the UK.

Considering the situation in Japan, where insufficient attention has been paid to the agreements between the parties and their significance in relation to legislative

(18)　In these passages where I describe circulation, I am, of course, inspired by Freedland's ideas as described below.

regulation, it seems that there is much to refer to in terms of what specific points need to be considered and what theoretical issues such disputes lead to.

Although it is an abstract approach, by setting up the concept of circulation and taking a bird's eye view of the two legal systems, we can better understand the location and position of the problems we face in Japanese employment law, as well as other jurisdictions.

Ⅲ Employment Contracts and Workers' Contracts in English Law

Here, the article will first give a general overview of the relationship of the rights and obligations in which parties to a contract of employment stand in English labour law.

1 Formation and Content of a Contract

The contract of employment, a traditional concept in English law, is a 'simple contract,' and no particular form is required for its formation.[19] However, as a general rule, a simple contract does not need to be made in any special form, but it requires 'the presence of consideration which ... broadly means that something must be given in exchange for a promise.'[20] In addition, there are the other requirements for a formation of a contract, such as the intention to create legal relations.[21]

In English contract law, the parties' agreements form part of the contract which become terms. The terms compose the content of a contract and bind the parties as their rights or obligations.

The most important terms as a source of contractual norms are express terms.[22] That is true of a contract of employment, although it is often the case that

(19) Jack Beatson, Andrew Burrows, and John Cartwright, *Anson's Law of Contract* (31st edn) (OUP, 2020) 77.
(20) Jack Beatson, Andrew Burrows, and John Cartwright, (n. 19) 77.
(21) Jack Beatson, Andrew Burrows, and John Cartwright, (n. 19) 31.
(22) Edwin Peel, *Treitel The Law of Contract* (15th. edn.) (Sweet & Maxwell, 2020) [6-001].

a contract of employment has been concluded without any formal document.[23] However, it has been pointed out that as the presence of collective bargaining has decreased, the standard forms prepared by the employers in concluding contracts of employment have made express terms in contractual forms more important.[24]

On the other hand, implied terms play an important role especially with respect to employment contracts. In English law, judges may imply terms not expressly inserted by the parties to a contract. The implication of judges composes part of their interpretation of a contract by judges.[25] A distinction has developed between two broad categories of case where terms are implied by the courts.[26]

The first are terms 'implied by fact,' which are terms which the parties did not expressly provide for in their contract but which it is found that they must have intended to include.[27] Collective agreements between employers and trade unions may be incorporated into the parties' contract through such an implication, thereby constituting the content of the contractual rights and obligations between the contracting parties.[28]

The second are terms 'implied by law'.[29] The terms implied by law are those inferred by the function of the law in certain types of contracts, and which give rise to various rights and obligations in those types of contracts.[30] A typical example of such a contract is a contract of employment between an employer

(23)　Hugh Collins, Keith Ewing, Aileen McColgan, *Labour Law* (2nd. edn.) (CUP, 2019) 110.
(24)　Hugh Collins, 'Legal Responses to The Standard Form Contract of Employment' (2007) 36 ILJ 2; Simon Deakin, 'Interpreting employment contracts: judges, employers, workers' in Sarah Worthington (ed.), *Commercial Law and Commercial Practice* (Hart Publishing 2003) 433.
(25)　The terms corresponding to contractual interpretation are construction and interpretation, which were traditionally understood as different actions, but seem to have become less strictly distinct in recent times (see Gerard *McMeel, McMeel on The Construction of Contrqacts: Interpretation, Implication, and Rectification* (3rd. edn.) (OUP, 2017) [1.20]); Edwin Peel (n. 22) [6-001].
(26)　Jack Beatson, Andrew Burrows, and John Cartwright, (n. 19) 158.
(27)　Jack Beatson, Andrew Burrows, and John Cartwright, (n. 19) 158; Edwin Peel, (n. 22) [6-050] (253).
(28)　Hugh Collins, Keith D. Ewing, Aileen McColgan, (n. 23) 129.
(29)　Jack Beatson, Andrew Burrows, and John Cartwright, (n. 19) 158; Edwin Peel, (n. 22) [6-050] (253).
(30)　Edwin Peel, (n. 22) [6-067] (264).

and an employee.[31] For example, the employer's duty to 'take reasonable care not to endanger the employee's health' is implied by operation of law even if the parties to the contract of employment do not expressly promise to do so.[32] In addition, the employer's duty of mutual trust and confidence is now recognized as an implied term in law in a contract of employment generally.[33]

2 Statutes and the Rights and Obligations

Apart from the contractual norms, the parties to a contract of employment are subject to the rights and obligations stipulated by the statutes.[34]

(1) The Rights of Employees Under the Legislation

In the UK, starting with the Contract of Employment Act 1963 (hereinafter 'CEA 1963'), the statutes have positioned the 'employee' as the main subject of rights in the individual employment law field, such as the right to statements of employment particulars,[35] the right to redundancy payment,[36] and the right not to be unfairly dismissed.[37] These rights are now comprehensively set out in the Employment Rights Act 1996 (hereinafter 'ERA 1996'), a central piece of individual labour relations enactment. So, the Act generally sets out the basic and important rights of employees in the UK.[38] Therefore, for the people who provide their labours or services in consideration of remuneration in the UK, the legal status as an employee in terms of ERA 1996, s. 230 (1) is of paramount importance.

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(31) Edwin Peel, (n. 22) [6-068] (265).
(32) Edwin Peel, (n. 22) [6-068] (265).
(33) *Malik v BCCI SA* [1997] IRLR 462.
(34) The following description is based on Emiko Shinyashiki, 'The Concept of Workers in English Employment Law,' (2013) 61(4=5) *Yamaguchi Keizaigaku Zasshi* (Yamaguchi University) 433, 438 with additions and corrections.
(35) CEA 1963, s. 4.
(36) Redundancy Payments Act 1965, s. 1.
(37) Industrial Relations Act 1971, s. 22.
(38) Hugh Collins, Keith D. Ewing, Aileen McColgan, (n. 23) 9.

(2) *The Expansion of Worker's Rights?*

On the other hand, the ERA 1996 originally had a provision that made the 'worker' the subject of right, the right not to suffer unauthorised deductions.[39] In addition, the Employment Rights Act 1996 itself was amended to introduce the sections to confer workers the right to be protected relating to his or her disclosures[40] and the entitlement relating to exclusivity terms unenforceable in zero-hours contracts.[41] Furthermore, in 2020, the right to statements of employment particulars, which was originally limited to employees, is now be granted to 'worker'.[42]

3　Definition of Employee, Worker, and Contract

(1) *Employee and Contract of Employment*[43]

In the ERA 1996, 'employee' means 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.'[44] There, 'contract of employment means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.'[45] Thus, if a person is a party to a contract of service, he is of various fundamental rights. In short, the application of legislation is essentially determined by the existence of a contract of service between the parties in question.

The concept of contract of service is a common law concept,[46] and the common law (case law) has clarified the definitional factors of a contract of service. The

(39)　ERA 1996, s. 13.
(40)　ERA 1996, Pt. 4A and s. 47B.
(41)　ERA 1996, s. 27A.
(42)　ERA 1996, s. 1 (1).
(43)　The following description is based on an article by Emiko Shinyashiki, 'Fragmentation of Content of Contract for Work and The Concept of "Normal Working Hour" for Calculation of Holiday Pay in English Law,' (2020) 86(4) *Hosei Kenkyu* (Kyushu University) 226, with additions and corrections.
(44)　ERA 1996, s. 230 (1).
(45)　ERA, s. 230 (2).
(46)　Zoe Adams, Catherine Barnard, Simon Deakin and Sarah Fraser Butlin, *Deakin and Morris's Labour Law* (7th edn.) (Hart Publishing, 2021), [2.2] (103-104), and [2.6] (108).

High Court in the *Ready Mixed Concrete* case[47] provides three requirements (the details will be discussed later). The first is the existence of consideration under contract law, the second is the existence of the employer's control over the employee, and the third is the consistency of the content of the contract with that of a contract of service. The existence or non-existence of a contract of service is determined by judges interpreting the content of the contract (rights and obligations) provided by the agreement of the parties.[48]

(2) *Employment Legislation and the Concept of Worker*[49]

'Worker' is defined as follows in ERA 1996 section 230 (3):

> In this Act, 'worker' ... means an individual who has entered into or works under (or, where the employment has ceased, worked under) —
> (a) a contract of employment, or
> (b) any other contract, ...whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
> and any reference to a worker's contract shall be construed accordingly[50] ...

Thus, 'worker' is a broader concept than 'employee,' which includes not only the contract of employment (contract of service) in (a) but also the contract in (b) above. Because what is ultimately disputed between the parties is the validity

(47) *Ready Mixed Concrete v Minister of Pensions* [1968] 2 QB 497.
(48) English contract law recognises a special character to the interpretation of contracts here which differs from ordinary contractual interpretation and recognises that the decision is a two-stage process: the recognition of rights and obligations and the assessment of those obligations (*Agnew v Commissioner of Inland Revenue* [2001] UKPC 28 [32]).
(49) The following description is based on an article by Emiko Shinyashiki, (n. 34) with additions and corrections.
(50) ERA 1996, s. 230 (3); NMWA 1998, s. 54 (3); WTR 1998, reg. 2.

of the claim of right that relies on the broadest concept, the existence or non-existence of (b) contract is often an issue with respect to the claim of the right granted to a worker. In the article, contracts corresponding to the limb (b) in practice would be referred to as a 'worker's contract' unless otherwise noted.

In this way, in the UK, a person who has (or had) a particular sort of 'contract' with the other party to a contract would reach the rights and obligations under the statute as an employee or worker.

4　Rights as 'a Floor of Rights'

What is unique to English law is the nature of these statutory rights and obligations.[51]

(1)　*Statutory Rights as a Floor of Rights*

As the statutory rights of employees expanded as described in 2 (1), these rights came to be regarded as 'a floor of rights'[52] for individual employees.[53] A minimum floor of working conditions was laid down, on which 'derogation from the statutory norms is generally prohibited,' and on which they were allowed to form 'improvement on the standards' by individual agreement or collective agreement.[54]

However, the rights of the employee or worker granted by the statutes are not, fundamentally, contractual rights.[55] Indeed, in English employment law;[56]

(51)　The following description is based on an article by Emiko Shinyashiki, 'The Features of Mandatory Regulations and nullified agreements in English Employment Law (1)' (2020) 87(1) *Hosei Kenkyu* (Kyushu University) 232, with additions and corrections.

(52)　Lord Wedderburn, *The Worker and The Law* (3rd. edn.) (Sweet & Maxwell, 1986), 6; Deakin and G. Morris, (n. 46) [2.2] (103).

(53)　For example, Hugh Collins, Keith D. Ewing, Aileen McColgan have characterized statute regulation as 'modifying, supplementing, or replacing a provision of an employment contract' that grounds the employer's unilateral authority over the employee or its abuse (Hugh Collins, Keith D. Ewing, Aileen McColgan, (n. 23) 7.)

(54)　Deakin and Morris, (n. 46) [2.2] (103).

(55)　Offering the phrase 'floor of rights,' Lord Wedderburn explains that 'the majority of these rights are not incorporated into the employment contract' and 'does not become part of the employment contract,' such as the right not to be unfairly dismissed (Lord Wedderburn, (n. 52) 5).

(56)　Deakin and Morris, (n. 46) [3.5] (244).

> contract plays a central role in defining the scope of modern employment protection legislation since … that legislation adopts the common law concept of the contract of employment for a number of purposes including the classification of employment relationships. However, claims arising under protective legislation are, for the most part, seen as statutory in nature, with individual statutes defining the scope of the relevant remedies.

Thus, the various rights and obligations under the statute, in principle, have their effect only as statutory ones.

(2) *Denial of Contracting Out*

Section 203 (1) of the ERA 1996 is a typical section that ensures the legal character of the statutory right as 'a floor of rights'. That section provides as follows:

> Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports —
> (a) to exclude or limit the operation of any provision of this Act, or
> (b) to preclude a person from bringing any proceedings under this Act before an [employment tribunal].

Section 203 (1) of the ERA 1996 renders void any agreement that restricts the operation of the sections in the ERA 1996 from (i) a substantive perspective and (ii) a procedural perspective. Thus, although certain 'exceptions' are prepared, 'an employee cannot voluntarily surrender or contract out of his statutory rights, and any statement or agreement to that effect is void.'[(57)] In this way, the section blocks any infringement by an agreement or a contract by parties to the effect of

(57) Astra Emir, Selwyn's *Law of Employment* (20th edn.) (OUP, 2018) [20.35].

the rights conferred on employees or workers by the statutes. It can be said that the sections similar to the ERA 1996, 203 (1) make the sections, which stipulate rights and obligations of parties, mandatory. In this article, such a section as section 203 (1) of the ERA 1996 will be referred to as 'SMRM,' that is, 'section to make rights mandatory'.

In the field of labour or employment law, the Trade Union and Industrial Relations (Consolidation) Act 1992, s. 288 (1), the Working Time Regulations 1998 s. 35 (1), the National Minimum Wage Act 1998 s. 49 (1) and etc.[(58)] provide the sections basically the same as ERA 1996, s. 203 (1).

Thus, the statute law rights of the employee or worker in the field of employment law are made independent of the common law and insulated from infringement by the function of the parties' agreement or contract.

Ⅳ *The Contract of Employment* - Between Agreement and Regulation

As can be seen from the above discussion, the legal rights and obligations on which the parties to a contract in the employment field in English law consist of those under contract law and those under statute law. *The Contract of Employment* edited by Mark Freedland is an attempt to advocate the law of contract of employment that comprehensively regard two bodies of law, common law and statute law, as a unitary mechanism for establishing the rights and obligations of parties to a contract of employment in the UK.

In Chapter 1, Freedland presents the justification and methodology that seem essential for understanding and constructing the law of contract of employment. Then, in Chapter 2, Freedland presents the structural principles of the contract of employment which is the basis for developing the law of the contract of

(58)　See also The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551) reg. 9; Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034) reg. 10; Gavin Mansfield QC (eds.), *Blackstone's Employment Law Practice* 2019 (OUP, 2019) [5.57].

employment. Freedland establishes such a general framework for discussion of the law of the contract of employment in the first two chapters. Then, the following chapters provide further general doctrinal elaboration of the law of the contract of employment and also apply those to the specific themes addressed in the following chapters.

Lord Justice Elias seems to disagree with Freedland's understanding of concepts such as mutuality of obligations and the role of the judiciary in interpreting such legal concepts based on such methodology and underlying structural principles. Such a conflict between the views regards the judiciary's role to interpret those legal concepts is interesting. It is the divergence between the academic and judiciary on that we focus.

Therefore, below, we first overview Chapters 1 and 2 delivered by Freedland, before addressing the concerns of Lord Justice Elias in **V**.

1 The Function of Human Resource Management and the Employment Contract

(1) Changes in the Institutional Environment Surrounding the Contract of Employment

Freedland starts the discussion in terms of the centrality of the contract of employment to labour law. He argues that the concept of contract of employment has been placed on the centrality of labour law and regards the fact as a justification for the start of his discussion with the concept of the contract of employment.(59) He seems that positing the centrality leads to articulating fundamental issues concerning the interpretation of labour law. He suggests that his articulation of the law of contract at the present is to 'replicate, in a changed environment, and in a changed form, the kind of institutional and contextual exposition,'(60) which should have been discussed as 'industrial relations' in the past.(61)

(59) Mark Freedland, 'General Introduction—Aims, Rationale, and Methodology' in Mark Freedland (gen. ed) *The Contract of Employment* (OUP, 2016) 4-5.
(60) Ibid, 6.
(61) Ibid, 6.

Sixty years ago, Otto Kahn-Freund 'was thinking about the law of the contract of employment as a system within a system (that of labour law) within a system (that of industrial relations); and he was concerned to identify the interactions and inter-dependences between those systems.'[62]

Freedland seeks;[63]

> to perform a corresponding function [as Otto Kahn Freund's writing described the law of the contract of employment] for current times, that involves a recognition and exploration of the fact that each of those systems or sub-systems has been crucially transformed in the intervening years, as therefore, have been those interactions and inter-dependences between [those systems].

At present, 'the very frame of reference itself for describing the institutional environment within which the law of the contract of employment functions'[64] has transformed: '[T]he corresponding body of social and economic practice is typically identified and studied under the heading of "human resource management"[65].'

In short, Freedland argues that 'the key changes in that particular composite body of social, economic, and legal arrangements or practice'[66] of the contract of employment should be incorporated into the theory of the law of contract of employment, or that the law of the contract of employment should be restructured accordingly, on the basis of the centrality of the employment contract in English law and the 'epistemological'[67] changes surrounding it.

(62)　Ibid, 7.
(63)　Ibid, 7.
(64)　Ibid, 8.
(65)　Ibid, 8.
(66)　Ibid, 8.
(67)　Ibid, 8.

(2) *Human Resource Management and the Law of the Contract of Employment*

The environment in which a contract of employment is placed today is very different from that in the time when the contract of employment was positioned as a 'figment of the legal imagination'[68] In the present, 'many if not most employment relations are ... couched in an array of documents which are self-consciously contractual and legal in character, much of the *purpose* of which is to align the work relation with employment legislation, fiscal regulation, and the social security system. Moreover, this characteristic is by no means confined to what remains of the "standard employment relationship" (emphasis by Freedland).'[69] '[T]his new contractualism have themselves been considerably transformed into the emergent genre of 'human resource management.'[70]

In practice, 'the turn to "human resource management" has tended to transform the making of a contract of employment into a more formalized and documented practice than it previously was, and in that sense, the contract of employment has become a more concrete institution.'[71] At the same time, '[t]he legal construction of the contract of employment is a process into which there are many inputs from diverse sources, centrally prominent among which is a very highly complex body of employment legislation.'[72]

By means of these arguments,[73] Freedland suggests that 'that notion of the contract of employment' is identified as 'an evolving legal institution within a changing social and economic institutional setting.'[74]

(3) *The Composition of the Legal Relationship*

Then, the question would arise relating to 'the sense in which and the extent to

(68) Ibid, 9.
(69) Ibid, 9.
(70) Ibid, 9.
(71) Ibid, 11.
(72) Ibid, 11.
(73) Ibid, 11.
(74) Ibid, 11.

which the employment relation can satisfactorily be identified as a contractual one.'[75] In the employment or labour law field, that question has always been argued in terms of 'status' or 'contract.'[76] Instead, Freedland suggests to 'think of the contract of employment as existing in a mixed domain of voluntarily agreed arrangements and imposed norms.'[77] This notion is 'expressed by the heading of the contract of employment between agreement and regulation.'[78]

The existence of 'human resource management,' as indicated before, has a great impact on the concrete way in which that mixing takes place. That is, '[t]hat activity of management includes the creation and conduct of employment relations, and therefore the formulation and application of the norms which govern those relations, and hence, in legal terms, the making, implementation, and termination of contracts of employment.'[79] Therefore, we may understand 'the real nature and function of the contract of employment'[80] by focusing on the phase in which the activity is interposed.

In this way, Freedland points out that human resource management or management activities exist as the starting point from which the employment relationship is legally constituted, and that the actual circumstances and legal significance of the current law of contract of employment appear in the way in which agreement and regulation are joined there.

After all, the impact of human resource management manifests itself in the signing of contracts, in the negotiation of the terms of contracts, and even in each modification, elaboration, or renewal of contracts within the employment relationship[81], where workers stand, to a greater or lesser extent, essentially on a 'take it or leave it' basis.[82]

(75)　Ibid, 11.
(76)　Ibid, 11.
(77)　Ibid, 12.
(78)　Ibid, 12.
(79)　Ibid, 12.
(80)　Ibid, 12.
(81)　Ibid, 12-13.

And it is within this framework that 'employers or working enterprises respond to the various kinds of external controls and constraints which may be imposed upon the employment relations in question.'(83) In effect, it is in the 'space'(84) in which the activity of management prevails that both the legal significance of the parties' agreement and the legal significance of the control exerted by legislative regulation or collective bargaining are realised and governed. However, because those activities are premised on legal concepts such as agreement or legislative regulation, they function as legal ones and have legitimacy in the legal world. If this is the case, then we need to analyse 'this process'(85) as a legal one that makes the contract of employment lie between agreement and regulation.

(4) *Indeterminate Contexts and Presentation in the Present*

Freedland notes that the space or process has so far been that of 'neglectfulness.'(86) He also points out that 'the management of employment contracts between agreement and regulation is a very context-specific,'(87) that is, that 'styles and approaches of employment contract management seem to vary widely, and to be highly contingent upon the regulatory context and prevailing attitudes at the time and in the place in question.'(88)

However, 'we can nevertheless make some suggestions about the evolving characteristics of employment contract management in the UK at the present time.'(89) The current employment relations are 'conceived and conducted in self-consciously legal contractual forms, closely and consciously adjusted to an environment of legal regulation.'(90)

(82) Ibid, 13.
(83) Ibid, 13.
(84) Ibid, 13.
(85) Ibid, 13.
(86) Ibid, 13.
(87) Ibid, 14.
(88) Ibid, 14.
(89) Ibid, 14.
(90) Ibid, 15.

The fact mentioned above is followed with 'normative implications for the law of the contract of employment.'[91] After all, he probes the current situations occupied with employers' 'intensified contractualization'[92] in management of the employment relationship through which they geared to the regulatory environment, including risk aversion.[93] Notably, the 'highly managed and formalized, and legally conscious' management of employment relationships has led to the 'precarization of employment relations and employment contracts' as embodied in the problems caused by the so-called zero-hours contracts.[94]

Thus, the normative significance of the 'contract of employment between agreement and regulation' has proved.[95] He inclines to think of the law of the contract of employment as 'the body of law which tempers and moderates the processes of contractual management of employment relations in which employers or work enterprises are engaged, often in a highly legally articulate and intelligent way.'[96]

More specifically, Freedland 'identifies a range of polices and ideological positions which are to greater or lesser extent latent in or influential upon the current law of the contract of employment, and to develop arguments as to why some of those should be accorded greater or, as the case may be, lesser weight than they currently are.'[97] As can be seen from the description so far, Freedland's argument is not limited to descriptive legal commentary. The attempt therein is, on the whole, 'to locate its normative critique *within* the law of the contract of employment as it is (emphasis by Freedland).'[98] In other words, the book tries to explore not only the law as it is, 'but in such a way as to disclose its capacity for institutional evolution, for reaction to changes in the social and economic

(91)　Ibid, 15.
(92)　Ibid, 15.
(93)　Ibid, 15-16.
(94)　Ibid, 17.
(95)　Ibid, 18.
(96)　Ibid, 18.
(97)　Ibid, 19.
(98)　Ibid, 23.

context in which it functions.'[99] It intends to develop from the intrinsic elements of the law of the contract of employment, although it looks forward to a normative development, and to seek a 'normative *reconstruction from the inside*'[100] (emphasis by Freedland).'

Freedland tries to reconstruct the concept of the employment contract as a legal one, including the effect of legislative regulation to the contract of employment. As a result, Freedland's understanding of the law seems to be structured in a way that is incompatible with the traditional understanding of the relationship between common law and legislative regulation. Or, as Freedland says:[101]

> [I]t is time to move on from that understanding of the doctrinal nature and subject matter of 'the law of the contract of employment' towards a different understanding in which 'the common law of contract of employment' and the legislative regulation of employment relations are seen as more deeply intertwined, to the point where each of those two elements has to be envisaged as a function of the other one.

As noted earlier, the concept of the contract of employment has traditionally been understood as a common law concept, and, fundamentally, statute law rights or obligations have been understood as independent of the function of the common law. However, Freedland argues that the relationship between the common law and the statute law should be seen as inevitably integrated:[102]

> On this view, the 'toolkit' is seen as having become part of the engine itself: 'the law of the contract of employment' can be envisaged as an intricate mechanism of interaction between two originally distinguishable sets of components

(99) Ibid, 23.
(100) Ibid, 23.
(101) Ibid, 24.
(102) Ibid, 24.

making up a complex circuit full of cross-overs and 'feedback loops'.

2　Interpretation by Judges and Structural Principles

Freedland has also clarified the understanding of the contract of employment placed between agreement and regulation. The placement is followed by unpacking the normative claims as below.

(1)　Definition and Legal Consequences of the Contract of Employment

In Chapter 2,[(103)] Freedland presents the 'legal structure of the contract of employment,' or the elements that weave that structure together. These elements of the law, as might be predicted from **1**, 'consist of norms derived both from the common law of the contract of employment, in the broadest sense, and from relevant legislation, which apply to contracts of employment in general or to a certain set of contracts of employment.'[(104)] Among all such 'principles,' 'structural principles' are 'those which serve to identify and define the basic shape of contracts of employment and their functioning.'[(105)]

These elements or structural principles correspond to the 'legal attributes of such a contract of employment.'[(106)] Thus, the structural principles represent the defining elements of the employment contract and, if they are identified in the arrangement between the parties, they lead to the contractual terms or legal consequences corresponding to those elements. Such arrangements between the parties can be described as 'propositions of the nature'[(107)] of the contract which give rise to such legal consequences.

However, there is no one-size-fits-all determination of whether or not, or to

(103)　Mark Freedland 'The Legal Structure of the Contract of Employment' in the same book as (n. 59) 28.
(104)　Ibid, 29.
(105)　Ibid, 29.
(106)　Ibid, 30.
(107)　Ibid, 30.

what extent, these elements and structural principles apply.[108]

(2) *Realization in the Judicial Arena and the Interplay between Common Law and Statute Law*

Freedland acknowledges the functions and the practices of the judiciary (the courts and the tribunals) as the space in which the normative claim of 'the contract of employment between agreement and regulation' is realised. Freedland recognises that the space or arena in which the legal structure (the legal meaning of the concept of employment contract) is formed is that in which the judiciary (courts and tribunals) operates.[109]

Importantly, in understanding the realization of the law of the contract of employment in that way or in that arena, Freedland cautions about the relationship between common law and statute law in the following points.

First, 'the common law of the contract of employment' 'in various senses always has evolved, and certainly in recent times has evolved, in an intricate symbiosis with employment legislation and various adjacent kinds of legislation ... so much so that it should be regarded as ultimately if not immediately inseparable from that large body of legislation.'[110]

Secondly, he points out that 'legislation can and often does shape that structure, or give rise to structural principles, in and of itself without the interposition of adjudication.'[111] In other words, in conceiving the elements of the law of the contract of employment, the functions of employment legislation are inevitably incorporated into the law, and even without the function of the common law, the structure may emerge from the function of employment legislation alone.

Then, in 'the process by which common-law adjudication, in the broadest sense of that notion, works to articulate the structural principles which constitute the

(108) Ibid, 33.
(109) Ibid, 34.
(110) Ibid, 34.
(111) Ibid, 34.

basic architecture of the law of the contract of employment,'[112] ... 'the sources of structural adjudication include the sources of terms and conditions of employment such as express agreement, legislation articulating terms and conditions of employment, collective agreements, trade customs, and relevant constitutional norms.'[113] They also embrace 'the doctrinal apparatus of the common law in a broad sense, including its notion of "terms implied by law", its techniques of statutory interpretation, its techniques for giving effect to legislation in a more general sense, and its remedial principles and techniques.'[114]

It is the judges who, with their broad discretions in terms of sources,[115] combine these sources of law, draw the legal consequences, and bring about the structural principles of the employment contract.[116] Naturally, in the current spread of contractual formalism in employment contractual relations as mentioned above, and in the current legal situation, the role of the judges is crucially important.[117]

(3) Three Core Structural Principles

While Freedland emphasizes the context-specific nature of the structural principles of the contract of employment[118] and also notes the diversity of current work arrangements,[119] he, nevertheless, presents three central structural principles as 'normative' ones:[120][121]

> They are normative or prescriptive in that they represent a normative view of the law of the contract of employment, a set of ideas which constitute the

(112)　Ibid, 34.
(113)　Ibid, 35.
(114)　Ibid, 35.
(115)　Ibid, 35-36.
(116)　Ibid, 36.
(117)　Ibid, 36-37.
(118)　Ibid, 37.
(119)　Ibid, 40-41.
(120)　Ibid, 41.
(121)　Ibid, 41.

normative commitments or purposes of the law of the contract of employment because they implement or fulfil the functions of labour law.

These principles are 'the exchange principle,' 'the integration principle,' and 'the reciprocity principle'[(122)]:

(1) a contract of employment should be regarded as essentially consisting of an exchange, or more usually a series of exchanges, of work and remuneration taking place in the context of a personal work relationship ('the exchange principle');
(2) where there is such an exchange or a series of exchanges of work and remuneration taking place in the context of a personal work relationship, the worker should be regarded and treated as being integrated into the organization of the employer or employing enterprise, ('the integration principle'); and
(3) where there is such an exchange or a series of exchanges of work and remuneration taking place in the context of a personal work relationship, the employer or employing enterprise and the worker should be regarded and treated as being committed to reciprocal co-operation in the conduct of that contractual relationship ('the reciprocity principle').

3 Summary

It is not at all easy to summarize Freedland's grand conception of the law of the contract of employment in brief, but as far as we have seen above, his conception, which other authors in *The Contract of Employment* seem to share, at least in broad terms, is quite challenging from the traditional view of the independence between common law and statute law in English law. Freedland's idea is to take seriously the reality of contractualization, which has become prevalent through the practice of human resource management, and to point out the importance

(122) Ibid, 42.

of the interpretive activities of the judiciary, which, in effect, governs the space of application between common law and statute law, in other words, the legal realization of the concept of the contract of employment between agreement and regulation.

Within that fluid space, judges are confirming and affirming the definitional contents (nature and elements) of the contract of employment and, at the same time, are forming and developing its legal consequences. In addition, various sources of law, including employment legislation, flow into that space, and the law of contract of employment develops from those sources, with common law judges formulating principles that sometimes bring about the structure of employment contracts. While cautioning against the tentative nature of such principles, Freedland nevertheless asserts three central structural principles as normative ones.

In this way, Freedland's conception of the law of the contract of employment is to view common law and employment legislation as an 'intricate symbiosis,' and to derive the structure, nature, or elements of the employment contract from that integrated perspective, and to conceive the legal relationship of rights and obligations in which parties to a contract of employment stand.

Ⅴ　Mutuality of Obligations and Some Signals from Lord Justice Elias

The major difference between Freedland's argument as confirmed in the above discussion and the view of Lord Justice Elias seems to appear in the placement of 'mutuality of obligations' and the understanding of its content. This section seeks to follow the development of the precedents on 'mutuality of obligations' in some detail to clarify the placement and content that the precedents have established. Then, it tries to confirm more concretely what Freedland and other authers in that book claim about the role of the judiciary in interpreting contracts of employment, and to identify what the specific points where Lord Justice Elias

disagrees with Freedland's line of argument.[123]

1 The *Ready Mixed Concrete* Case and MacKenna J's Formula

In the field of English employment law, whether as an employee or a worker, it is those who have (or had) a 'contract' of a certain kind with the putative employer who can reach the rights and protections afforded by statute. For that determination, the definition of a contract of employment or contract of service is problematic. Furthermore, some of the rights granted to 'employees' require continuity of employment based on a contract of employment for a certain period of time in order for the employee to be granted the right.[124] A typical example is the right not to be unfairly dismissed under section 94 (1) of the Employment Rights Act 1996. For this right to be granted to an employee, there must be continuity of employment, which is currently two years.[125] Therefore, a person who works in reliance on an arrangement between the parties, known as a zero-hours contract, is required to prove the existence of a continuous contract of employment with the alleged employer in question in order to claim the right under the statute. It is in this context that the common law definition of a contract of service and the mutuality of obligations become controversial.

We should begin with a confirmation of MacKenna J's formula in *Ready Mixed Concrete*, mentioned earlier. As noted there, MacKenna J provides that a contract of service will come into existence when three requirements are met, namely (i) consideration, (ii) control, and (iii) consistency. In addition, it is important to note how MacKenna J legally positioned the three requirements in his formula:

> As to (i) [consideration]. There must be a wage or other remuneration. Otherwise, there will be no consideration, and without consideration no

(123) The following description of cases is based on Emiko Shinyashiki, (n. 6) 79 below, with additions and corrections.
(124) See ERA 1996, ss. 210-219.
(125) ERA 1996, s. 108 (1).

> contract of any kind.[126]
>
> The third and negative condition is for my purpose the important one ...[127]
>
> An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract (a task like that of distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control.[128]

These passages delivered by MacKenna J identify the sequence of the three requirements. First, if the first requirement, consideration, did not exist, there would be no contract of any kind between the parties in the first place. Therefore, this is the first requirement to be determined. Next, the requirement of control is a 'necessary' condition, and if this is not satisfied, the determination of the existence of a contract of service ends there. Moreover, the third requirement, the consistency with a contract of service, added by MacKenna J, is held to be a 'negative condition.'[129] Its priority, therefore, is ranked third. The determination of whether there is a contract of employment between parties, by and large, consists of two stages. The first stage is determining the formation of a contract. The second stage is determining the nature of that contract.

Within this framework, concerning the third requirement, MacKenna J held that judges may 'take into account other matters besides control' in determining the nature of the contract. This holding by MacKenna J has provided parties

(126)　[1968] 2 QB 497, 515 (E).
(127)　Ibid, 516 (B).
(128)　Ibid, 516 (G)-517 (A).
(129)　Ibid, 516 (B).

later contesting the existence of a contract of service with a legal basis for arguing to the judge that 'there are facts to be considered 'besides control.' In this way, the determination of whether there is a contract of employment or not becomes a judgment of multiple factors, as the English academics describe it as a multiple test or approach.[130]

2 The Development of a Multiple Approach

The influence of MacKenna J's reasoning in the *Ready Mixed Concrete* case is easily recognised in the reasoning of Cooke J in *Market Investigations Ltd v Minister of Social Security:*[131][132]

> I begin by pointing out that the first condition which must be fulfilled in order that a contact may be classified as a contract of service is that stated by MacKenna J. in the *Ready Mixed Concrete* case [1968] 2 Q.B. 497, 515, namely, that A agrees that, in consideration of some form of remuneration, he will provide his own work and skill in the performance of service for B. The fact that his condition is fulfilled is not, however, sufficient. Further tests must be applied to determine whether the nature and provisions of the contract as a whole are consistent or inconsistent with its being a contract of service.

Then, in addition to control,[133] Cooke J indicated that the so-called economic reality test may be relied upon,[134] and the economic reality test was 'the fundamental test.'[135] It is noteworthy that, in his judgment, the control test and the other test (the economic reality test) are treated as tests in nature for determination of 'whether

(130) Deakin and Morris, (n. 46) [2.17] (134); Hugh Collins, Keith. D. Ewing, Aileen McColgan, (n. 23) 207.
(131) [1969] 2 QB 173.
(132) Ibid, at 183 (B)-(C).
(133) Ibid, at 183 (D).
(134) Hugh Collins, Keith D. Ewing, Aileen McColgan, (n. 23) 205-206.
(135) [1969] 2 QB 173, 184 (G).

the nature and provisions of the contract as a whole are consistent or inconsistent with its being a contract of service.[136]' Likewise, in *Beloff v Pressdram Ltd*,[137] which is regarded as having set out the so-called organizational or integration test with *Stevenson, Jordan and Harrison Ltd v Macdonald and Evans*,[138] Ungoed-Thomas J, referring to Cooke J's reasoning above, held that not only the control test but also the integration test could be relied on determining whether the contract in question is consistent or inconsistent with contract of service.[139]

As suggested above, where parties to a contract in the employment field had to show the existence of a contract of service, parties in disputes have relied on the reasoning or formula of MacKenna J in *Ready Mixed Concrete*, asserting the significance of the other tests besides control test, and alleging facts in cases that would fall within the tests.

3　From the Second Stage to the First Stage – Positioning as a Consideration

(1)　*Mutuality of Obligations among Various Factors*

As with the emergence of economic reality test or integration test, mutuality of obligations has emerged in cases. A typical example is *Airfix Footwear Ltd v Cope*.[140] In that case, the employer's counsel submitted the test of mutual obligations — no 'obligation to provide work by the company; they could provide it or not as they chose' and no obligation on the putative employee to take work and choices to refuse at any time[141] — in parallel with the tests of control, integration, economic reality, and other tests which show the contract in question consistent or inconsistent.[142] Furthermore, the counsel argued that because there was no mutuality of obligations between the two parties as described above, 'the

(136)　Ibid, 183 (C).
(137)　[1973] 1 All ER 241 (Ch. D).
(138)　[1952] 1 TLR 101; Deakin and Morris, (n. 46) [2.14].
(139)　[1973] 1 All ER 140, 250 (f)-(g).
(140)　[1978] ICR 1210.
(141)　Ibid, 1213 (B)-(C).
(142)　Ibid, 1213 (B)-(E).

contract which existed between her and the company was at most a contract which provided the general terms upon which she would do work, but it was not a contract of employment.'[143] He argued that 'if there was a general contract of this kind, then each time that she actually did work, she would be entering into a separate contract.'[144] In response to these arguments, Slynn J in the EAT held that:[145]

> if the arrangements between a company and a person are such that work may be provided and may be done at the will of either side — in other words, that the company may provide or not, as it chooses and the other person may accept the work or not, as he pleases—it may well be that this is not properly to be categorised as a contract of employment.

As can be seen from the foregoing, Slynn J in the EAT had to make the decision on whether or not a contract was formed (whether or not the contractual consideration was recognized) by a so-called zero-hours contract at the stage of determining the nature of the contract, corresponding to the parties' arguments. Although the real issue in that case on the formation of a contract, that is, the existence of consideration in contract law, was determined at the second stage of determining the nature of a contract, the decision itself must have been affirmed if the conclusion of the Industrial Tribunal (then), which had exclusive jurisdiction over the facts, was affirmable. On the other hand, it is true that where a party at that time sought a determination of an existence of a contract of employment for the courts or tribunals, counsels for employer or employee must have asserted the tests besides control at the second stage for the determination of nature of a contract, based on the case law at the time which had continued the formula of MacKenna J in *Ready Mixed Concrete*.

(143) Ibid, 1213 (F).
(144) Ibid, 1213 (F)-(G).
(145) Ibid, 1214 (C).

The Court of Appeal in *O'Kelly*[146] continued this roundabout way of determining a mutuality of obligations. That is, the majority of the Industrial Tribunal (IT) (then) in that case, as cited by the Court of Appeal, after finding and assessing whether the various facts, in that case, were 'consistent' or 'inconsistent' with a contract of service,[147] concluded as follows:[148]

> It is freely recognized that the relationship of the applicants to the company had many of the characteristics of a contract of service. In our view the one important ingredient which was missing was mutuality of obligation.
>
> We are, of course, aware that lack of mutuality of obligation is not, in itself, a decisive factor and that outworkers can, in appropriate circumstances, be employees working under a contract of employment, even though there is no obligation to provide work or perform it (*Airfix Footwear Ltd. v Cope* [1978] ICR 1210...). Nevertheless, this was a factor on which we placed very considerable weight in making our assessment.

As can be seen from the above, in the IT in *O'Kelly*, mutuality of obligations appeared as a test for determining nature of a contract, rather than a test for determining formation of a contract. The Court of Appeal in *O'Kelly*, which considered the various factors provided by precedents,[149] while elaborating on the jurisdiction points of the upper courts, which could not deal with a question of fact,[150] allowed the appeal of the putative employer.[151] That result came from that neither the Court of Appeal nor the EAT, which had no jurisdiction over the

(146)　[1984] 1 QB 90 (CA).
(147)　Ibid, 104-105.
(148)　Ibid, 106 (A) and (D).
(149)　Ibid, 104 (G).
(150)　Ibid, 107 (D) below.
(151)　Ibid, 118 (H), 122 (E), and 127 (A).

facts, could interfere with the decisions of the IT in very limited cases.

(2) The Position as Consideration

Subsequently, the roundabout way for determination of mutuality of obligations as in the *O'Kelly* case resolved in the judgment of the Court of Appeal in the *Nethermere case*.[152] In the proceedings in *Nethermere*, the counsel 'contended for the company that there must indeed be mutual obligations before a contract of service can exist'.[153] In response to the argument, Stephenson LJ in the Court of Appeal in that case, citing the reasoning of MacKenna J in *Ready Mixed Concrete*, stated:[154]

> I do not quote what he says of (i) and (ii) except as to mutual obligations: "There must be a wage or other remuneration. Otherwise, there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill."
>
> There must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service.

There, Stephenson LJ in the Court of Appeal regarded mutuality of obligations as a test that was a requirement for the formation of a contract. In other words, the placement of mutuality of obligations by Stephenson LJ as an 'irreducible minimum of obligation' is similar to the first requirement, consideration, provided by Mackenna J in *Ready Mixed Concrete*. Therefore, the view of Stephenson LJ in *Nethermere* revived the pecking order of the three requirements recognized in the formula set by MacKenna J in *Ready Mixed Concret* for determination of contract of service or employment.

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(152) [1984] ICR 612.
(153) Ibid, 622 (F).
(154) Ibid, 623 (E)-(F).

The lucid analysis of Kerr LJ in the Court of Appeal in the *Nethermere* case is more illuminating. In holding that the determination of the existence of a contract of employment was 'a two-stage process,'[155] Kerr LJ stated as follows:[156]

> [N]o issue arose in [*O'Kelly*], as it does in the present case, on the requirement of some legally binding contract at the first stage, because the decision of the tribunal in that case had been that there was in any event no 'umbrella' contract of employment, and the majority of this court merely held that this was a conclusion of fact and degree which the tribunal was entitled to reach.
>
> The present appeal differs from all these cases, because the issue is fairly and squarely whether the requirement, at the first stage, of some legally binding 'umbrella' contract has been satisfied, and whether the tribunal took into account that some mutually binding legal obligations must exist before they were entitled to go on to consider whether, as a matter of fact and degree, these gave rise to a 'contract of employment' or a 'contract of service' at the second stage.

In the above explanation by Kerr LJ, he was certainly conscious through the course of the proceedings[157] that the issue in the *Nethermere* case was the point of mutuality of obligations as consideration which was a requirement for a formation of contract. The holding by Ker LJ shows that the mutuality of obligations had come to be regarded not as a question of the second or third requirement as provided by MacKenna J in the *Ready Mixed Concrete* case, but as a question of consideration which must be satisfied at first.[158]

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(155)　Ibid, 628 (E)-(G).
(156)　Ibid, 629 (C)-(E).
(157)　Ibid, 627 (G)-628 (D).
(158)　There is a detailed examination by Nicola Countouris of the changes in the position and content of mutuality of obligations from the decision of the Employment Appeal Tribunal in *Airfix Footwear* to the decision of the House of Lords in *Carmichael* (Nicola Countouris, 'Uses and Misuses of 'Mutuality of Obligations' and the Autonomy of Labour Law' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (ed.) *The Autonomy of Labour Law* (Hart

In the *Carmichael* case,[159] Lord Irvine expressed the mutuality of obligations as follows:[160]

> I would hold as a matter of construction that no obligation on the C.E.G.B. to provide casual work, nor on Mrs. Leese and Mrs. Carmichael to undertake it, was imposed. There would therefore be an absence of that irreducible minimum of mutual obligation necessary to create a contract of service *(Nethermere (S. Neots) Ltd. v Gardiner* [1984] I.C.R. 612, 623C-G, per Stephenson L. J., and Clark v Oxfordshire Health Authority [1998] I.R.L.R. 125, 128, per Sir Christopher Slade, at para. 22).

In that passage, there was no reference to *O'Kelly*, because the question in *O'Kelly* was not the same as that in *Nethermere* or *Carmichael*.

4 Lord Justice Elias's Signals

In subsequent cases, the position and content of mutuality of obligations, which was at issue in the House of Lords in *Carmichael* and other cases, is most clearly illustrated by Lord Justice Elias in *Stevenson v Delphi Diesel Systems Ltd.*[161] In that decision in the EAT, Lord Justice Elias held as follows:

Publishing, 2015) 169-188). He says, 'It is also worth noting that in [the decision in *Nethermere*] the Court of Appeal first referred to MacKenna J's view ... as 'mutual obligations', thus effectively using the same label of mutuality to address both 'consideration' and the new 'essential ingredient' of mutuality as 'continuity'' (Ibid, 178). Thus, Countouris seemingly suggests that case law became to deal with the issue of both consideration and the nature of contracts in terms of the mutuality of obligations. However, as this article has shown, it understands that the stage at which the issue of consideration or legal enforceability was raised in the courts or tribunals changed from the second stage to the first stage in response to how the parties argued about that issue relying on the formula set by MacKenna J in *Ready Mixed Concrete*.

(159) [1999] ICR 1226.

(160) Ibid, 1230 (G)-(H).

(161) [2003] ICR 471.

> The significance of mutuality is that it determines whether there is a contract in existence at all. The significance of control is that it determines whether, if there is a contract in place, it can properly be classified as a contract of service, rather than some other kind of contract.(162)

> Without some mutuality, amounting to what is sometimes called the 'irreducible minimum of obligation,' no contract exists.(163)

> The issue whether the employed person is required to accept work if offered, or whether the employer is obliged to offer work as available is irrelevant to the question whether a contract exists at all during the period when the work is actually being performed.(164)

In *Cotswold Developments Construction Ltd v Williams*,(165) Langstaff J in the EAT took a similar view of the position and content in which the mutuality of obligations was a requirement for formation of contract.(166) Langstaff J in the *Cotswold* case also held that '[t]he issue in *Carmichael* was not directed to whether, when the power station guides were actually engaged in guiding visitors around the power station, they were acting as employees or not.'(167)

He pointed out that the issue in the previous decisions was whether there was a continuing contract, such as so-called an umbrella contract.(168) Furthermore, he noted that, Mr Recorder Underhill QC in *Bryne Brothers (Formwork) Ltd v Baird* said, 'The basis of the requirement of mutuality is not peculiar to contracts

(162)　Ibid, [11].
(163)　Ibid, [12].
(164)　Ibid, [14].
(165)　[2006] IRLR 181.
(166)　Ibid, [16] below and [40] below.
(167)　Ibid, [21].
(168)　'Umbrella contract' means a continuous contract that encompasses the entirety of the provisions of service that are made on an intermittent basis.

of employment: it arises as part of the general law of contract.'[169] Langstaff J in the *Cotswold* case continued, 'It is no part of the general law of contract for instance that one party to a contract ... must offer either work or payment, and the other party to the contract agree to work if asked to do so. That would be a requirement of mutuality specific to contracts of employment, but not specific to the general law of contract.'[170] He also explained that Mr Recorder Underhill QC's holding in Bryne Brother case as to the mutuality of obligations was to the same effect as that given by Lord Justice Elias in the *Stephenson* case.[171]

Notably, in the case of *James v Greenwich London Borough Council*,[172] in response to Mr Justice Langstaff's explanation above, Lord Justice Elias held as follows:[173]

> The authorities do not speak with one voice as to precisely what mutual obligations must be established. The relevant cases were analysed carefully by Mr Justice Langstaff in *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181 at paras 19-23. As he points out, sometimes, the employer's duty is said to be to offer work, sometimes to provide pay. The critical feature, it seems to us, is that the nature of the duty must involve some obligation to work such as to locate the contract in the employment field. If there are no mutual obligations of any kind then there is simply no contract at all, as Carmichael makes clear; if there are mutual obligations, and they relate in some way to the provision of, or payment for, work which must be personally provided by the worker, there will be a contract in the employment field; and if the nature and extent of the control is sufficient, it will be a contract of employment.

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(169) Ibid, [40] (*Byrne Brothers (Formwork) Ltd v Baird* [2002] ICR 667 (EAT) [25].).
(170) Ibid, [40].
(171) Ibid, [40].
(172) [2007] IRLR 168, [2007] ICR 577 (EAT).
(173) Ibid, [16] and [17].

> In short, some mutual irreducible minimal obligation is necessary to create a contract; the nature of those mutual obligations must be such as to give rise to a contract in the employment field; and the issue of control determines whether that contract is a contract of employment or not.

Thus, in the judicial precedents, the justices have clarified that the mutuality of obligations discussed in the House of Lords in *Carmichael* and other cases is not a test relating to the nature and classification of contracts but is now an issue related to the concept of consideration which parties are required to establish a formation of contract. In addition, in clarifying the placement of mutuality of obligations, it had been pointed out that in order to inquire whether a contractual arrangement, which is called an umbrella contract, can be said to have established a continuing contract, the question of a continuous binding nature or mutuality of obligations arises. In other words, if existence of a contract is in question with respect to the period during which the services are actually rendered, judges had repeatedly held that it was not necessary to establish the continuous binding mutuality as in the *Carmichael* case. Also, in the judgment of Lord Justice Elias in the *James* case following the explanation of Langstaff J in the *Cotswold* case, he clearly distinguished the two stages for determination (the first is for determination of formation of a contract, while the second is for determination of nature or characteristic of a contract in question.). With the clarification of the stages, what tests are to be questioned at each stage of determination became clear. In other words, Lord Justice Elias clarified what test should not be taken into account at each stage.

Perhaps, resulting from this clarification concerning the tests to be considered at each stage of the determination process and the subject matter of the finding, Lord Justice Elias even referred to and gave a signal for the use of s. 212 of the Employment Rights Act 1996 in *James v Redcats (Brands) Ltd*,[(174)] even though the

(174)　[2007] IRLR 296, [2007] ICR 1006 (EAT).

application of the section was not at issue in that case:[175]

> [T]ypically the focus on mutuality of obligation arises in circumstances where a worker is employed intermittently by an employer and the question arises whether there is a contractual relationship in the period when the worker is not actually working. This is important for establishing continuity of employment (although sometimes s. 212 of the Employment Rights Act 1996 will assist in that regard).

5 The Supreme Court in the *Uber case*

In 2021, Lord Leggatt in the Supreme Court in the *Uber* case[176] citing the reasoning of Lord Justice Elias in the case of *James v Redcat (Brands)*, Lord Leggatt clarified that it is sufficient to inquire into the mutuality of obligations (consideration) only as to the duration of the contract in the case of that the existence of a contract is in question as to the specific periods during which the work is actually being done:[177][178]

> Equally, it is well established … that the fact that an individual is entirely free to work or not, and owes no contractual obligation to the person for whom the work is performed when not working, does not preclude a finding that the individual is a worker, or indeed an employee, at the times when he or she is working: see eg *McMeechan v Secretary of State for Employment* [1997] ICR 549; *Cornwall County Council v Prater* [2006] EWCA Civ 102, [2006] ICR 731. As Elias J (President) said in *James v Redcats (Brands) Ltd* … [2007] ICR 1006, para [84]:
>
> 'Many casual or seasonal workers, such as waiters or fruit pickers or casual

(175) Ibid, [78].
(176) *Uber BV v Aslam* [2021] UKSC 5.
(177) See also Ibid, [90].
(178) Ibid, [91].

> building labourers, will periodically work for the same employer but often neither party has any obligations to the other in the gaps or intervals between engagements. There is no reason in logic or justice why the lack of worker status in the gaps should have any bearing on the status when working. There may be no overarching or umbrella contract, and therefore no employment status in the gaps, but that does not preclude such a status during the period of work.'
>
> I agree, ...where an individual only works intermittently or on a casual basis for another person, that may, depending on the facts, tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with worker status.

Therefore, it seems that Lord Leggatt with whom all other Lords agreed in the Supreme Court in the *Uber* case shares the view of the position and content of the mutuality of obligations in the employment field as established by judges including Lord Justice Elias in the James case.[179]

6　The Difference in Views between Academic Commentators and Lord Justice Elias

As suggested by Lord Justice Elias who reviewed the book[180] *The Contract of Employment*, of which Freedland is the editorial representative, it understands and positions the mutuality of obligations in the precedents differently from the judges:[181]

> in my [Lord Justice Elias's] view, it is wrong to suggest, as the book does in

(179)　*James v Redcats (Brands) Ltd* [2007] ICR 1006.
(180)　Patrick Elias, (n. 12).
(181)　Patrick Elias, (n. 12) 883.

> number of places, that the courts have held that there can be no contract of employment in place even for each separate engagement unless there is a continuing mutuality of obligations.

Why does the difference in understanding mutuality of obligations in the precedents appear between the courts and the academics?[182]

(1) *The Function of Statute Law to Supplement the Common Law*

First, the change in the placement of mutuality of obligations from the decision of the Court of Appeal in the *O'Kelly* case to the decision of the Court of Appeal in the *Nethermere* case was not very clear.

However, the academic literature also pointed to the development of the above-mentioned precedents. Gwyneth Pitt suggested '[t]here is quite a lot of authority for the view that mutuality of obligations, like any other characteristic of the contract of employment, is merely one factor to be considered and cannot be decisive.'[183] She also said, 'It is true that in *Nethermere* all members of the Court of Appeal thought that mutual obligation was essential since otherwise they thought that no sort of contract was in existence in any case.'[184]

Freedland himself also pointed out:[185]

> The casting of the discussion about the contractual continuity of employment of casual or intermittent workers in terms of mutuality of obligation has fundamentally realigned the direction of that discussion. It has gradually shifted the discussion away from a primary concern with classifying the contracts in which arrangements for casual and intermittent work are

(182) The following discussion draws on the correspondence between the author and Lord Justice Elias.
(183) Gwyneth Pitt, 'Law, Fact and Casual Workers' (1985) 101 LQR 217, 237.
(184) Ibid, 238.
(185) Mark Freedland, *The Personal Employment Contract* (OUP, 2003) 101.

> embodied as contracts of employment or contracts for services. The discussion in terms of mutuality of obligation has increasingly been seen as posing a differently framed, and indeed logically prior, question; namely, do those arrangements give rise to a continuing contract, of any kind at all.

These would require the second reason for the difference in understanding of precedents relating to the concept of mutuality of obligations between the judges and some of the academics.(186) Freedland, in *The Contract of Employment* on which he is the editorial representative, was referring to the concept of mutuality in the *Carmichael* case, said as follows:(187)

> [T]he modern default position of the law of the contract of employment seems to be the one which was essentially established, or at least confirmed, by the decision of the House of Lords in *Carmichael v National Power plc* concerning the employment status of a group of tour guides who worked under essentially casual or on-demand arrangements which would now be thought of as a form of 'zero-hours contract.' It was held that continuity of mutual obligation was a definitional requirement for their being regarded as employed under continuing contracts of employment, and that, contrary to the view of the Court of Appeal, no such continuing mutual obligation could be attributed to

(186)　Hugh Collins, Keith Ewing, and Aileen McColgan say, 'It is often said that 'mutuality of obligations' is a factor that helps to determine whether a contract should be classified as creating employee status or worker status. It is true that an agreement to provide work in return for remuneration is necessary for some kind of contract to exist. But the requirement of mutuality of obligations is unhelpful in distinguishing between different kinds of employment status, because for all three types of contract – employment, worker and independent contractor – the agreement on mutuality of obligation is the same: an exchange of work for another in return for payment. ... [S]ometimes the phrase 'mutuality of obligations' is taken to mean a long-term commitment by the employer to provide work and remuneration, but such a long-term arrangement has never been a necessary feature of contracts of employment: hirings by the day, the hour and even the minute have been permitted.' (Hugh Collins, Keith Ewing, Aileen McColgan, (n. 23) 207). See also Hugh Collins, 'Employment Rights of Casual Workers' (2000) 29 ILJ 73.

(187)　Mark Freedland, (n. 59) 31.

> their work relations with National Power although those relations had been in existence over a long period of years.

Furthermore, Freedland states the following in relation to the third structural principle mentioned earlier:[188]

> [I]n the negative sense, this third principle sustains a critique of the way in which the law of the contract of employment sometimes insists upon some degree of *continuing mutual obligation* as being necessary to the very recognition of the existence of a contract of employment (emphasis by Freedland).

What does Freedland mean by the passages above? It might be true that, as Nicola Countouris argues in Chapter 17[189] of the same book, Freedland indicated that the common law understanding of mutuality of obligations prevents the application of the various continuity-compensating systems prepared by the statute, such as section 212 (1)[190]. As noted above, it seems clear that Lord Justice Elias was trying to encourage the use of the section. However, Freedland's argument, in particular, seems to be a normative one that where the existence of the contract of employment is an issue in relation to a contractual arrangement such as a zero-hours contract, such a factual basis resulted in exchanges between work and remuneration should be viewed as a continuing legal relationship, insofar as the existence of the exchange referred to in the first principle is recognized. Freedland ultimately seems to suggest that we should recognise the unitary body of law of the contract of employment which absorbed the function

(188) Ibid, 45.

(189) Nicola Countouris, 'The Contract of Employment as an Expression of Continuing Obligations' in the same book as (n. 59) 362.

(190) It stipulates: '[a]ny week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.' With the support of this section, an employee may construct continuity of employment even with intermittent employment basis on contracts of service.

of the statutes, such as article 212 (1) of the ERA 1996, into the law of the contract of employment. Thus, Freedland's argument seems to lead to the assertion that the common law as a forum for forming and realizing the law of the contract of employment, should develop the law of contract of employment that is consistent with the various norms contained in the statute law, rather than focusing on mutuality of obligation which purely exists as the simple doctrine of consideration in the common law world.

In contrast, Lord Justice Elias in his article seems to disagree with the creation or development of the law of contract of employment in the way proposed by Freedland. For example, in response to the criticism against the judgement of the House of Lords in *Carmichael* by Einat Albin and Jeremias Prassl, in which they say that 'no clear explanation exists as to why a contract of employment should require continuity of employment and of contract,'[(191)] Lord Justice Elias answered, 'I find that a very surprising statement. How can one properly describe the relationship as contractual when no mutual obligations exist between the parties so that neither can make a claim on the other? There is simply no consideration from either side.'[(192)] In this way, Lord Justice Elias basically responds to Freedland and other leading professors' argument by affirming traditional common law principles.

(2) Relationship Between Statute Law and Common Law

While we can see the conflicting understandings of the mutuality of obligations described in (1), we can also recognize that the confliction in understanding the relationship between the statute law and the common law of contract underlies the confliction.

To develop Freedland's understanding of common law and statute law as a

(191)　Einat Albin and Jeremias Prassl, 'Fragmenting Work, Fragmented Regulation' in the same book as (n. 59) 209, 222.
(192)　Patrick Elias, (n. 12) 881.

unitary body of law,[193] ACL Davies, in Chapter 4 of the book,[194] presents a moderate view of the interrelation between common law and statute law regards the contract of employment. In doing so, Davies draws on a review of key cases, including *Johnson v Unisys*[195] and *Autoclenz v Belcher*,[196] discussed below, to explain how to understand the relationship between common law and statute law:

> [I]t is appropriate in principle for the courts to consider how any proposed common-law development fits with the statutory scheme. This is because employment law is a field heavily dominated by statute, and achieving a regime that is coherent taken as a whole is important from a Rule of Law perspective.[197]

> [S]ince employment law is a subject in which statute and common law are now closely intertwined, the courts should develop the common law alongside statutes to create a coherent system in line with fundamental tenets of the Rule of Law.[198]

In this way, 'Professor Davies's approach would seem to be consistent with the notion, adopted by Professor Freedland as one of the methodological principles, that the common law should be read with statute so as to create a single body of doctrine.'[199]

On the other hand, Lord Justice Elias says:[200]

> The third methodological feature is said to be a particular doctrinal analysis which is designed to see the operation of the contract of employment not as something separate from — and occasionally modified by — legislation, but

(193) ACL Davies, 'The Relationship between the Contract of Employment and Statute' in the same book as (n. 59) above, 73.
(194) Ibid.
(195) [2001] UKHL 13.
(196) [2011] IRLR 820.
(197) ACL Davies, (n.193) 94.
(198) Ibid, 95.
(199) Patrick Elias, (n. 12), 879.
(200) Ibid, 873-874.

> as a body of doctrine inextricably interrelated with it. Professor Freedland suggests that the time has now come when common law and statute should be seen as 'a consolidated and inseparable body of legal doctrine', so that 'each of those two elements has to be seen as a function of the other one.' This is a highly controversial claim. Whilst there is no doubt that legislation can, and has, directly affected the development of the common law — the so-called dismissal exclusion zone following the House of Lords' decision in *Johnson v Unisys* (which I discuss below) is an obvious example — I confess to having considerable doubts as to whether it is either accurate in a descriptive sense or desirable in a normative sense to link the development of the common law to the shifting patterns of potentially highly political legislation. A proper appreciation of the law's impact on the worker will, of course, need to take fully into account what will often be a complex interplay of common law and legislative principles, and there are clearly various points of intersection between them. Moreover, at a general level both will be concerned with mitigating the imbalance in bargaining power. But in my view treating these two independent legal sources as giving rise to an inseparable body of doctrine exaggerates the interplay of what I believe still constitute distinct sources of law which are subject to their own distinct principles.

From these passages, it is clear that Lord Justice Elias also acknowledges a certain interrelationship between the common law and the statute law.[201] However, he still ascertains that the independent legal systems are subject to 'their own distinct principles.' It seems that what Lord Justice Elias has recognised, in his article, that ACL Davies, and Freedland's 'notion' are as same as Lord Hoffmann in *Johnson*.[202] Lord Justice Elias seemed to raise the *Johnson* case as an example of where such understanding of bodies of law as a unitary one realised a 'danger.'[203]

(201)　See also ibid, 873.
(202)　Ibid, 879.

He seems to suggest the independent space for the common law in which it develops without the statute being 'treated too readily as conferring a ceiling rather than a floor of rights.'(204) More broadly or abstractly, '[l]egislation is typically passed to deal with a specific problem, and the danger in attempting to fit the common law to it is that the legislation will have greater impact than it ought to have.'(205)

How, then, do the courts develop the function or creativity of the common law in relation to statute law, not as a 'ceiling' but rather as providing protection, the way how or space where 'various points of intersection between [common law and statute law]'(206) appear which Lord Justice Elias has also approved? To clarify this point, let us now look at the development of the law on contractual interpretation at the stage of deciding the application of the statutes, which can be said to have been the essential precedents delivered by Lord Justice Elias.

Ⅵ The Development of Common Law on Contract Interpretation

Unlike Japanese employment law, in the UK, as mentioned above, the question of whether or not the employment legislation is applicable is determined by the existence of a certain type of contract. Therefore, how to find the facts as a premise for making the determination, or in other words, how to find or interpret the contractual rights and obligations between parties, is crucially important. This is because, as Freedland pointed out earlier, employers, as utilizing their human resource management, seek to ensure that the contract between the putative employer and the putative employee is not to be identified as a contract of service or a worker's contract which triggers the application of the statute and to stipulate in detail in writing that the contract between the parties is not

(203) Ibid, 880.
(204) Ibid, 880.
(205) Ibid, 880.
(206) Ibid, 874.

such a contract.[207] The question then arises as to how the judges and others should find contractual rights and obligations between parties, and jurisprudence has developed common law concerning the interpretation of contracts in the phase of determining the application of the employment legislation.[208]

1　The Agreement Structure Approach – The Judgment of the House of Lords in the *Carmichael* Case

This issue has been debated in the case law for a very long time, and in 1998, the House of Lords in *Carmichael*[209] set out, in brief, the approach to contract interpretation as follows. That is, if 'they [the parties] intended [documents] to constitute an exclusive memorial of their relationship,' the Tribunal must interpret the contract solely by reference to the contractual documents.[210] However, the Tribunal may find that the contractual documents were 'intended that it should be contained partly in the letters, partly in oral exchanges at the interviews or elsewhere and partly left to evolve by conduct as time went on. This would not be untypical of agreements by which people are engaged to do work, whether as employees or otherwise.'[211]

As can be seen from the above, the approach to contractual interpretation advanced by the House of Lords in the *Carmichael* case included not only the written documents, but also oral communications at the interview as materials to be examined by judges to identify the rights and obligations between parties. Moreover, the agreement was 'partly left to evolve by conduct as time went on,' after the conclusion of the contract in question.[212] In other words, the House of Lords in *Carmichael* endorsed an interpretation approach in which judges

(207)　See Hugh Collins, (n. 24); Simon Deakin, (n. 24).
(208)　For a discussion of the development of case law on contract interpretation in this context, see Emiko Shinyashiki, (n. 6), Part I, Chapter 5.
(209)　*Carmichael v National Power plc*. [1999] ICR 1226.
(210)　Ibid, 1233.
(211)　Ibid, 1234 (per Lord Hoffman).
(212)　Ibid, 1234.

also include the circumstances that appeared *after* the conclusion of a contract for finding rights and obligations between parties to the contract. The House of Lords thus relativised the significance of written documents in the interpretation phase of a contract.

2 Ingenuity in Common Law – The Judgment of the EAT in the *Kalwak* Case

However, the agreement structure approach in interpretation of contract established in the House of Lords in *Carmichael* still relied on the parties' intentions in relation to the contract as the basis for such an approach. In other words, whether the court could adopt such an approach depended on the intention of the parties in particular cases.

In *Consistent Group Ltd v. Kalwak*,[213] while the House of Lords decision in *Carmichael* was not directly relied upon, it was the approach of Peter Gibson LJ of the Court of Appeal in *Express & Echo Publications Ltd. v Tanton*[214] that Lord Justice Elias in the EAT had to confront. Peter Gibson LJ in the *Tanton* case argued that the focus of contractual interpretation should be on the contractual rights and obligations between the parties rather than on the actual events that occurred between them.[215] Peter Gibson LJ in the Court of Appeal in the *Tanton* case, had also suggested that where there was an express term in the finding of the rights and obligations of the parties, the judge was required to find the existence of sham so as to deny the express term.[216] Such an approach for contractual interpretation was in some respects at odds with the approach set out in the House of Lords decision in *Carmichael*, which allows for contract interpretation without adherence to written documents. In addition, according to the explanation of Peter Gibson LJ in the *Tanton* case, it was held that it is required to evaluate the express terms as sham to find the contents of

(213) [2007] IRLR 560(EAT).
(214) [1999] ICR 693 (CA).
(215) Ibid, 698.
(216) Ibid, 698.

the contract contrary to the express terms.[217] However, the House of Lords in *Carmichael* had nothing to say about the relation of the agreement structure approach to the sham doctrine in finding such terms as are inconsistent with express terms.

Therefore, in the *Kalwak* case, where a detailed contractual document was prepared, Lord Justice Elias affirmed the decision of the Employment Tribunal (ET) by skilfully handling the point and showing the way to find the contents of the contract without being bound by the contractual document, as follows:

> The possibility that the express terms may be dismissed as a sham was recognised by Peter Gibson LJ in *Express and Echo v Tanton* [1999] ICR 693. That was a case which concerned whether there was an obligation personally to perform the work. The Court of Appeal emphasised that the answer to that question had to be determined by asking what legal obligations bind the parties rather than by focusing on how the contract was actually carried out ...[218]
>
> The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship. Peter Gibson LJ was alive to the problem ...[219]
>
> In other words, if the reality of the situation is that no-one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship.[220]

(217)　Ibid, 698.
(218)　*Consistent Group Ltd v Kalwak* [2007] IRLR 560 (EAT), [56].
(219)　Ibid, [57].
(220)　Ibid, [58].

Thus, Lord Justice Elias placed the reasoning of Peter Gibson LJ in the Court of Appeal in *Tanton* as a precedent which also emphasised that contractual interpretation is the activity of 'asking what legal obligations bind the parties.' Also, in considering what 'the real relationship' was, given the existence of 'armies of lawyers' involved in the drafting of contracts of employment, Lord Justice Elias indicated that there was space for identifying legal rights and obligations that differed from express terms.

However, it is not clear how such a decision by Lord Justice Elias deals with the relationship with the traditional sham doctrine. In other words, when viewed only at the level of the doctrine of contract interpretation, it is not clear how the existence of 'armies of lawyers' in itself can be the basis for granting special treatment to contracts in the employment field, or whether it defines the scope to which the conventional common law doctrine does not apply.

Later, in the Court of Appeal in *Kalwak*,[221] Rimer LJ rejected Lord Justice Elias's judgment in that case on the ground that the Lord Justice Elias's decision in the EAT was one of finding a contractual term contrary to an express term without making any assessment that the express term was a sham.[222]

3 The Purposive Approach – The Supreme Court Decision in *Autoclenz* Case

However, in the *Autoclenz*[223] case, the Supreme Court proposed the purposive approach:[224]

> So, the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This

(221) *Consistent Group Ltd v Kalwak & Ors* [2008] EWCA Civ 430, [2008] IRLR 505.
(222) Ibid, [40].
(223) *Autoclenz Ltd v Belcher* [2011] UKSC 41; [2011] IRLR 820.
(224) Ibid, [35].

> may be described as a purposive approach to the problem. If so, I am content with that description.

In providing this purposive approach, Lord Clarke confirmed that Lord Justice Elias's judgment in *Kalwak* was based on the precedent and justifiable[225] and that the purpose of contract interpretation is to consider what was the legal obligation of the parties, or, in other words, to consider the content of their 'true agreement'.[226] Lord Clark then proposed the 'purposive approach' to contract interpretation as in the passage above. There, Lord Clarke chose the universal circumstances relating to contracts in the employment field as the justification for finding terms of contract without absolute reference to the contractual documents, that is, 'relative bargaining power of the parties' (i.e., the disparity in bargaining power between the putative employer and the putative employee or worker).

Thus, the purposive approach presented by the Supreme Court in the *Autoclenz* case, is similar to the contract interpretation approach in *Carmichael* in that it allows judges to find rights and obligations between the parties without being bound by contractual documents. However, the purposive approach provides judges with the stable approach to contract interpretations without adhesion to contractual documents. Nevertheless, at the stage of the Supreme Court in *Autoclenz*, the purposive approach can be still regarded as being grounded only in the perspective of common law. This is because the basis of the disparity in bargaining power is the harm caused by the principle of freedom of contract, and therefore the purposive approach can be understood to have been adopted as something that the common law intrinsically overcomes.

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(225)　Ibid, [24]-[26].
(226)　Ibid, [29].

4 The Supreme Court Decision in the *Uber* Case

Further,[227] Lord Leggatt in the *Uber* case[228] reinforced the justification for the purposive approach set out by Lord Clarke in the Supreme Court in the *Autoclenz* case, showing that the purposive approach is a contractual interpretation approach to determining the application of a statute:

> What was not, however, fully spelt out in the judgment [*Autoclenz* (SC)] was the theoretical justification for this approach. It was emphasised that in an employment context the parties are frequently of very unequal bargaining power. But the same may also be true in other contexts and inequality of bargaining power is not generally treated as a reason for disapplying or disregarding ordinary principles of contract law[229] ...
>
> Critical to understanding the *Autoclenz* case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and the courts was not, unless the legislation required it, to identify whether, under the terms of their contracts, *Autoclenz* had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of a "worker" in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation.[230]

(227) The following description is based on Emiko Shinyashiki, 'The Characterization of Contract and the Principles of Interpretation of Contract in the Employment Law Field in English Law' (2021) 88(2) *Hosei Kenkyu* (Kyushu University) 344, with additions and corrections.

(228) [2021] UKSC 5; [2021] IRLR 407.

(229) Ibid, [68].

(230) Ibid, [69].

Lord Leggatt held that the various provisions set forth in statutes in the field of labour law are intended to overcome contractual terms such as wages that are too low for labour or service and working hours that are too long, either as a result of or as a practical manifestation of, subordination or dependency resulting from the disparity in bargaining power based on the freedom of contract.(231) He seemed to affirm that the purpose of the employment legislation was to overcome such contractual terms. If the general principles of contract interpretation (e.g., parole evidence rule) are applied directly to contract interpretation, which plays a vital role in the application of the provisions of the statute against the background of such purposes, the problem of the disparity in bargaining power between employers and workers, which the statute sees as the root of the problems, will be reinstated.(232)

Furthermore, Lord Leggatt pointed out that the regulations in the field of labour law (statute law) contain SMRMs and that the statute law recognises and limits the problems posed by the disparity in the bargaining power of the parties to an agreement, which justifies the purposive approach.(233) Lord Leggatt notes that there has already been the development of precedent(234) in the field of general contract law, which has affirmed contractual interpretations in which judges may interpret contracts being apart from the contractual document, but that it is not sufficient to rely on that case law stream in relation to the contractual interpretation for the determination of the application of legislations in the employment field.(235) Lord Leggatt affirmed that, because of the negative effects of this insufficiency and the existence of the SMRMs generally recognized in employment legislation, which were established in response to the insufficiency, judges have much freedom to depart from the contractual documents in the interpretation of contracts

(231)　Ibid, [71]-[75].
(232)　Ibid, [76].
(233)　Ibid, [79], [81] and [82].
(234)　*Street v Mountford* [1985] AC 809.
(235)　[2021] UKSC 5; [2021] IRLR 407 [81] and [82].

for the purpose of determining the application of statutes than they do in the interpretation of contracts in the field of general contract law.[236] Thus, Lord Leggatt reinforced the rationale for the purposive approach and the position of that approach, which is specific to the application of employment legislation.

5 The Inter-relationship Between Common law and Statute Law

As we traced and confirmed in the case law above, the *Uber* decision supplemented the justification for the purposive approach and provided a powerful push for that approach in the employment law field. Then, should we expect the relationship between common law and statute law to transform into an integral one, as Freedland argues?[237] If so understood, the *Uber* decision might lead a fundamental shift in labour law as a whole. However, it is noteworthy that Lord Justice Elias whose decision in *Kalwak* led to the purposive approach in *Autoclenz*, said the following in his article:[238]

> There is no doubt that zero-hours contracts are a matter of very great concern. This is because they are often—although not always—cynically constructed agreements, framed by the employer in order to avoid their legal duties. I do not believe that the common law can successfully deal with them alone. *Autoclenz* allows a court to deal with the cases where the agreement is a sham, but the problems arise when it genuinely reflects the way in which the contract is performed, although the worker would choose that the contract were otherwise. The courts cannot simply ignore express terms or apply some general doctrine of unconscionability to invalidate a contract because of unequal bargaining power. The remedy must lie in legislations. Even then, there are real practical difficulties because there is a not insignificant number

(236) Ibid, [82].
(237) The following discussion draws on the correspondence between the author and Lord Justice Elias.
(238) Patrick Elias, (n. 12) 884.

> of people for whom the flexibility of a zero-hours contract, when they can pick and choose their work, is a real benefit … For such workers, it is simply misleading to describe the freedom to reject work as a 'notional right', as the authors do [in the book *The Contract of Employment*]; it may be a very real benefit.

As can be seen, Lord Justice Elias pointed to the existence of interests or arrangements between providers and recipients of works, whose meaning or basis in the legal world is to be first provided by common law. Although the freedom of contract can cause harm, it manages the function to reflect in the world of law the facts changing in various ways, including the facts corresponding to digitalization or informatization. Viewed slightly differently, it can be said that it is unnecessary to consider the various rich policy values in statute law within the framework of agreements or contracts provided by common law.

In view of the above, it can be seen that Lord Justice Elias, even under the influence of the *Uber* decision, would basically place the interpretation of contracts within the activities of the common law.[239] On the other hand, he would probably disagree with the prospect of evolving the law of contract of employment on the basis of an integrated understanding of the common law and statute law, as Freedland suggests, for the same reasons that he expresses in his article. Common law and statute law should be developed according to their own values, and statute law should function as a floor of rights but not a ceiling that limits the development of the common law.

On the other hand, we must recall that Lord Justice Elias in *Kalwak* used the term 'armies of lawyers,' and the courts have been conscious of the widespread use of contractual documents as has done so by Freedland and have formed

(239)　See also footnote 237.

contractual interpretation in the employment field different from the ordinary approach. Lord Leggatt in *Uber* specifically looked to the purpose and rationale of the statute to provide ample justification for adopting and endorsing the purposive approach. Thus, the common law does indeed develop its jurisprudence in response to the development or divergence of arrangements or agreements in the employment field and in response to the purposes or policies of statute law. In the Supreme Court's decision in the *Uber* case, we surely see the development of the common law, which, though admittedly step by step, certainly confirms the intentions of the parties and the content of their agreement in an elaborate manner, respecting the effect of the statute.

However, we should be careful of proceeding to the notion that the courts, including the Supreme Court in the *Uber* case have accepted contract interpretation as supplementing or modifying the parties' agreement. In view of what we have seen in detail above about Lord Justice Elias's understanding, for the sense of judges, to search for the goal of the purposive approach seems the role of the common law, and beyond that, the role of policies or Parliament.(240)

Ⅶ Conclusion

The structure of the legal relationship between the parties to a contract of employment in English employment law has a remarkable character when compared with that found in Japan. The first striking feature is that the legal rights and obligations between the parties to a contract in the employment field consist of two independent, yet co-existing, legal systems. Unlike Japan, in principle, the rights and obligations based on the statute law are not regarded as those under the contract. The statute law indeed frequently refers to the concepts derived from common law,(241) but that does not mean that the rights and

(240) See Patrick Elias, (n. 12), 884-886.

(241) Steven Anderman, 'The Interpretation of Protective Employment Statutes and Contracts

obligations under the statute law have meaning under the common law.

The contract of employment activates the legal system, and the activation needs contractual interpretation by common law judges. Freedland finds the notion of the contract of employment *between* agreement and regulation and tries to conceive the law of the contract of employment through composing it with the realities surrounding the contract, common law, and statute law therein. In other words, Freedland understands common law and statute law as forming an inextricable 'circuit' in which each law feeds back its own existence and significance while accepting the changes in the realities surrounding the contract and regards the phenomenon in the 'circuit' itself as the development of the law of contract of employment. He attempts to achieve the normative clarification of the law of the contract of employment based on the three structural principles.

Viewing Freedland's argument of the law of the contract of employment from the perspective of the concept of circulation mentioned earlier in this article, it seems to posit the development of the law of the contract of employment in terms of circulation. Concretely, it argued the development of the law, as consisting of existing law and its changes resulted from the development of the factual context in which the law of the contract of employment is placed, the development of statutes, and the development of common law as it is evolving in response to changes in those statutes.

On the other hand, the understanding of Lord Justice Elias does not assume such a unitary one, but rather it is based on the traditional viewpoint that the common law and the statute law are independent sources and the systems of law. Lord Justice Elias sees some danger in trivializing the generality of the common law in the direction proposed by Freedland and believes that the two bodies of law contain their own legal principles, which should be fully exercised and preserved.

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of Employment' (2000) 29 ILJ 223 describes the situation.

However, it would not be fair to say that Lord Justice Elias believes that the statute has no effect on common law. In the decision of the EAT in *Kalwak*, Lord Justice Elias pointed out himself the existence of 'armies of lawyers' that emerges in the process of concluding a contract of employment, from which he derived an approach of contractual interpretation that leads to the purposive approach. In addition, in the Supreme Court decision in the *Uber* case, Lord Leggatt affirmed the Supreme Court decision in the *Autoclenz* case, which affirmed the contract interpretation approach of Lord Justice Elias in the *Kalwak* case, and in reinforcing the justification for the purposive approach, he cited the purpose of the statutes and the SMRMs in the statutes (ex. s. 203 (1) of the ERA 1996). More abstractly, Lord Leggatt in the *Uber* case found the norm inherent in the statute, which shows the statute was aware of the adverse effects of freedom of contract for the parties in various phases and incorporated the fact as justification for the purposive approach into the field of contract interpretation, which is basically occupied by the functions of the common law.

On the other hand, this approach to contractual interpretation has been regarded as essentially a search for the parties' agreement.[(242)] Lord Justice Elias understands that measures supplementing or modifying the parties' agreement are to be taken by Parliament. Moreover, even if statute law developed so radically that employment legislation prepares provisions to deem in some way formation or content of contracts in the employment field, the common law would still develop its own principles and values independently.

Thus, from the judicial point of view, the content of the legal relationship in which the parties stand in the contract of employment can be conceived as the

(242) *In M & P Steelcraft Ltd v Ellis* [2008] IRLR 355, Lord Justice Elias, in deciding whether the statute applied, held that a term denying the contractual character of the arrangements at issue, in that case, was void because the term contravened the SMRM (s. 203 (1) of the ERA 1996). However, Lord Justice Elias found that the substance of the agreement which gave rise to the arrangement did not give it the character of a contract. Thus, he distinguished between finding the intention or agreement of the parties and realizing the function of a statutory provision.

sum of these independent legal systems, although it is true that the development of contract law, the development of statute law, and the development of mutual legal principles through the interaction of common law and statute law are possible.

When we look back at the situation of Japanese law from the above discussion in the UK, there seem to be certain limitations to the traditional way of thinking deeply embedded into Japanese academic theories and judicial precedents. As mentioned above, in the UK, the academics reviewed the way of conceiving rights and obligations between parties to a contract of employment and suggested the notion, the contract of employment as something 'between' agreement and regulation. In addition, the judicial precedents have developed contract interpretation doctrine that reflected the policies and purposes of the enactment while assuming the role of the common law in the interpretation of contracts where the law is realised.

This development of theories and precedents attributes to the circumstances that the English employment legislation sets the concept of contract as a criterion of its application. However, it is characteristic of both countries that the legal relationship is based on the concept of contract, especially the contract of employment. Therefore, it should not be overlooked that while forms of work have diversified, UK academics are reconstructing the legal relationship between parties to a contract in the employment field, reviewing the changing circumstances around agreements or arrangements between parties. The judicial precedents have also recognised and furthermore examined the legal significance of various arrangements prepared by parties, and judges certainly have developed jurisprudence at the level of the Supreme Court on how to interpret contracts corresponding to the changes or the realities.

Then, in a legal system that requires parties' agreements or contracts to be the trigger for their legal relationship of rights and obligations, can a particular 'nature' of contract be formulated, and can the rights and obligations of the parties be

derived from it? After we have returned from the debates in the UK, such a way of thinking in Japan seems to lead to an endless discussion on the legal relationship set by an agreement by parties whose legal existence is not sure or whose legal status remains highly ambiguous. As Lord Justice Elias points out,(243) the forms of agreements may vary according to the ingenuity of the employer. The ingenuity may undoubtedly have substance in responding to on-going changes in work itself in the context of informatization or digitalization. Those who provide the labour may also enjoy certain benefits from such arrangements. If we expect rights and obligations to arise from the natures of the contract of employment, which presumes a continuous open-ended contract of employment, the natures of such contracts cannot be said to be certain in the context of the growing diversity of employment arrangements. If the legal concepts, such as agreement or contract, in civil law cannot capture these real changes, the law will fail to bring into the legal world the facts of society which, like the flow of water into an aquarium, provide the impetus for circulation and the resulting development of the law.

As Freedland and other leading scholars in the UK have boldly attempted, the legal significance of the parties' factual and contractual arrangements, and their relationship with contract law and employment legislation should be thoroughly elucidated. At the same time, however, it is necessary to link this process of circulation to the steady development of contract law (and furthermore, tort law)(244) and employment legislation.

(243) See Patrick Elias, (n. 12) 880.

(244) The development of vicarious liability in English law is also noteworthy (See *Barclays Bank v Various Claimants* [2020] UKSC 13, [2020] 2 WLR 960; *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12, [2020] 2 WLR 941).