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THE FRAGMENTATION OF ENGLISH CONTRACT LAW – FROM A LAW OF CONTRACT TO A LAW OF CONTRACTS

Nosirov Kobiljon Shavkatovich,

Lecturer, Department of Civil and Private International Law, University of World Economy and Diplomacy.

ABSTRACT

This article explores how English contract law has shifted from a unified body of principles to a series of specialised regimes that reflect the diversity of modern social and commercial relationships. It begins by outlining the classical model of contract law, grounded in freedom of contract and general rules applicable to all agreements. The discussion then examines Atiyah's influential critique, which argues that the idea of a "typical contract" has disappeared, giving way to laws shaped by policy, context, and fairness. Through examples drawn from employment, consumer, construction, and domestic contracts, the paper illustrates how fragmentation operates in practice, resulting in tailored protections and obligations for different contracting parties. The article also considers the continuing debate between those who defend a unified "law of contract" and those who recognise multiple "laws of contracts." It concludes that while fragmentation reduces coherence and predictability, it has made English contract law more responsive and just in addressing inequality and modern complexity. Overall, the law is evolving not through collapse but through transformation—from a single system into a flexible network of contextual rules designed to meet varied social needs.

Keywords: *English contract law, Fragmentation, Freedom of contract, Law of contract vs. law of contracts, Legal coherence, Fairness and predictability, Consumer law, Employment contracts, Contract theory*

1. INTRODUCTION

Classical English contract law developed during the nineteenth century, built on the idea that individuals are free and equal in making agreements. The law was shaped by the belief that people should be bound by the promises they make, as long as those promises are made voluntarily and with proper intention. This reflected the social and economic conditions of the time, where trade and private enterprise were rapidly expanding, and the law needed to protect the freedom of business dealings.

Writers such as Sir Frederick Pollock and Sir William Anson portrayed contract law as a coherent and self-contained system. They believed that a small number of general principles could explain almost every type of contractual relationship — principles such as offer and acceptance, consideration, and intention to create legal relations. Under this "classical" view, the law of contract was a single, unified body that could apply equally to commercial traders, consumers, or private individuals. It valued predictability and consistency, aiming to uphold agreements as freely made bargains rather than as tools of social regulation (Anson, 1884; Pollock, 1876).

However, this traditional model was built on an assumption of equality of bargaining power, which, in reality, often did not exist. Over time, as industrialisation expanded and the modern welfare state evolved, it became clear that many contractual relationships — such as those between employers and employees, or companies and consumers — did not fit neatly into this model. The law's commitment

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to freedom of contract began to appear less suited to the complex and unequal relationships of modern society (Collins, 1999).

This historical background sets the stage for the modern debate about whether English contract law still functions as a single system based on general principles, or whether it has fragmented into a collection of specialised regimes. The next section will explore this transformation through the influential critique of P.S. Atiyah, who argued that the very idea of a unified "law of contract" is no longer realistic in today's legal landscape.

1. Atiyah's Critique – No "Typical Contract" and the Decline of General Principles

One of the most influential challenges to the classical view of contract law came from P.S. Atiyah, whose work reshaped how scholars and judges think about contracts. In his book *The Rise and Fall of Freedom of Contract* (1979), Atiyah argued that the idea of one general law of contract had become unrealistic. He claimed there was no such thing as a "typical contract", because contracts serve very different purposes in different social and economic contexts.

According to Atiyah, the classical model assumed that contracts were made between individuals who negotiated freely and equally. But in the modern world, that assumption rarely holds true. Many contracts are now formed between parties with unequal bargaining power, such as employers and employees, landlords and tenants, or large corporations and consumers. In such relationships, the freedom to negotiate is limited, and the weaker party often has little genuine choice but to accept standard terms imposed by the stronger one (Atiyah, 1979).

Atiyah also noted that the moral foundation of contract law had shifted. In classical theory, enforcing a promise was seen as a matter of individual responsibility — keeping one's word. In contrast, modern contract law increasingly reflects social policy and regulation, focusing on fairness, consumer protection, and equality rather than simple enforcement of promises. For example, statutory interventions like the Consumer Rights Act 2015 and the Unfair Contract Terms Act 1977 show how the state now plays a larger role in shaping the contractual relationship.

This development, Atiyah suggested, signified the decline of general principles. Rather than one unified set of doctrines applying across all types of agreements, modern contract law has evolved into multiple sub-systems, each with its own logic and policy goals. The flexibility that once made the general principles powerful has gradually been replaced by specialised rules designed for particular types of relationships.

Atiyah's critique opened the door for later writers, such as Hugh Collins (1999) and Roger Brownsword (2006), who further explored how contract law interacts with social regulation and public policy. Together, these scholars helped shift the focus from the "freedom of contract" ideal to the realities of regulated, socially embedded contracting, laying the foundation for what many now call the *fragmentation* of English contract law.

2. Fragmentation in Practice – Employment, Consumer, Construction, and Domestic Contracts

The practical side of fragmentation in English contract law becomes clear when we look at how different areas of law now deal with contracts in distinct, context-specific ways. What was once a unified field governed by a small set of general principles has, over time, divided into multiple specialised regimes, each reflecting different social, economic, and moral priorities. This section explores how this fragmentation operates in practice across four key areas: employment, consumer, construction, and domestic contracts.

3.1 Employment Contracts

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Employment law represents one of the clearest examples of how far the idea of pure "freedom of contract" has been replaced by statutory and regulatory control. In classical terms, a contract of employment was simply a private agreement between an employer and an employee, based on mutual consent. However, in reality, there has always been an imbalance of power between the parties — the employer typically controls the terms, while the employee has limited bargaining strength.

Over time, the law has stepped in to correct this imbalance. The Employment Rights Act 1996 grants workers a wide range of protections, such as unfair dismissal rights, redundancy payments, and maternity leave. Similarly, the Equality Act 2010 prevents discrimination within employment relationships. These interventions reflect a move away from classical contract principles (like freedom and consent) toward broader social justice goals. As Collins (2010) notes, the modern employment relationship is shaped more by statutory duties and implied terms of fairness than by negotiation or consent.

The courts also recognise this shift. In cases like *Autoclenz Ltd v Belcher* [2011] UKSC 41, the Supreme Court held that written contract terms could be disregarded if they did not reflect the true reality of the working relationship. This shows how the courts now look beyond the formal contract to ensure fairness — a major departure from the classical model that valued certainty over substance.

3.2 Consumer Contracts

Consumer contracts form another area where classical principles have given way to statutory regulation. Traditionally, a contract between a trader and a consumer was treated like any other private bargain. However, in practice, consumers rarely negotiate terms; they are presented with standard-form agreements or "take it or leave it" conditions. This has led to an entire body of consumer protection law that operates independently from the general law of contract.

The Consumer Rights Act 2015 (CRA) consolidated much of this regulation, introducing fairness and transparency as key principles. It requires contract terms to be "fair" and written in clear, intelligible language (s.62–68 CRA 2015). The law also provides automatic rights regarding goods and services — such as the right to satisfactory quality or reasonable care and skill — which cannot be excluded by agreement.

Cases like *Director General of Fair Trading v First National Bank* [2001] UKHL 52 confirmed that fairness now overrides classical doctrines like freedom of contract. As Brownsword (2006) argues, this approach reflects a regulatory model of contract law, where public policy and consumer welfare take priority over the idea of self-regulating private bargains. In effect, consumer contract law has become a distinct sub-system, guided by protection, not autonomy.

3.3 Construction and Commercial Contracts

While employment and consumer law emphasise protection, construction and large commercial contracts show another side of fragmentation — standardisation and industry practice. These contracts are often negotiated between businesses of roughly equal strength and rely heavily on pre-drafted forms such as JCT (Joint Contracts Tribunal) or NEC (New Engineering Contract) templates. Unlike consumer or employment law, this area still values freedom of contract, but within a framework of industry norms and commercial expectations. Courts often defer to these established standards and interpret the contracts in light of their commercial context, as seen in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38. As McKendrick (2020) points out, this shows that even within commercial contracting, there are multiple "micro-systems" governed by custom, trade usage, and sector-specific terms.

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Thus, while these agreements remain private bargains, they operate within a self-contained world that looks quite different from consumer or employment contracts — reinforcing the idea that there is no single, unified "law of contract" anymore.

3.4 Domestic and Family Agreements

Finally, domestic or family agreements reveal another layer of fragmentation, where the boundaries of contract law itself are blurred. The courts have long held that not all agreements are intended to be legally binding. In *Balfour v Balfour* [1919] 2 KB 571, a husband's promise to pay his wife an allowance was not treated as a contract because it was a domestic arrangement lacking legal intention. Here, the principles of contract law yield to social and moral expectations. Agreements within families, friendships, or informal settings are typically excluded from legal enforcement to preserve personal trust and social order. This area stands in direct contrast to commercial and employment contracts, where legal enforceability is central.

In effect, domestic agreements illustrate that contract law does not operate with one fixed logic; its application depends heavily on context, purpose, and social values.

Across these examples, we can see a clear fragmentation of English contract law. Employment and consumer contracts are dominated by statutory protection and public policy; commercial contracts rely on custom and negotiation; and domestic agreements are often excluded from the system entirely. Each area follows its own principles and objectives.

As Atiyah (1979) and later Collins (1999) observed, these divisions reflect the reality that modern contract law no longer operates as a single, coherent framework. Instead, it has become a collection of overlapping regimes, each shaped by its own social and economic context.

"Law of Contract" vs. "Law of Contracts"

The fragmentation of English contract law has given rise to a major theoretical debate: should we still speak of a single, unified *law of contract*, or has it become more accurate to refer to multiple *laws of contracts*? This debate captures the tension between traditional doctrinal coherence and the modern reality of specialisation and regulation.

4.1 The Classical (Singular) View: A Unified System

Traditional scholars, especially those influenced by nineteenth-century thinking, have long treated contract law as a single, general discipline. Writers such as G.H. Treitel and Friedrich Kessler defended the idea that all contracts, regardless of context, could be explained through a common set of principles — offer and acceptance, consideration, intention to create legal relations, and remedies for breach. These principles, they argued, form the foundation of a coherent body of law that maintains certainty, predictability, and equality before the law (Treitel, 2007).

Supporters of this view argue that a general law of contract promotes legal coherence. It allows courts to develop consistent doctrines and provides individuals and businesses with predictable rules. Without shared principles, contract law could risk becoming too fragmented, leading to confusion and inconsistency. McKendrick (2020) points out that while contract law has adapted to social change, its core principles still underpin diverse areas — for example, the concepts of offer, acceptance, and breach apply in both consumer and commercial settings.

In this sense, the singular "law of contract" acts as a unifying language for different contractual relationships. Even where statutes modify outcomes — such as in employment or consumer protection — they often still rely on the same structural concepts of agreement, obligation, and remedy. The unifying framework may be thin, but it remains visible.

4.2 The Modern (Plural) View: A Collection of Regimes

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On the other hand, modern scholars like Atiyah (1979), Collins (1999), and Brownsword (2006) argue that the traditional idea of one general contract law has largely broken down. In their view, it is no longer realistic to treat all contractual relationships as governed by the same moral or legal principles. Instead, contract law has become a collection of distinct regimes, each responding to the needs and values of its particular context.

For example, consumer contracts are designed around protection and fairness, employment contracts around welfare and equality, and commercial contracts around efficiency and certainty. The rules and policies that govern these areas often conflict — what counts as "fair" in a consumer contract might make no sense in a commercial one. As Collins (1999) suggests, contract law today is better understood as a *network of related but independent systems*, rather than a single, unified discipline.

The pluralist approach reflects the regulatory turn in modern law — where the state and specific industries shape legal rules to meet social objectives. Under this model, contract law is no longer self-contained but deeply embedded in public policy. Brownsword (2006) goes further, suggesting that we might not have "contract law" at all, but rather "laws of contracts", each driven by its own moral and regulatory logic.

4.3 Reconciling the Two Perspectives

Some scholars attempt to bridge these opposing positions by recognising both unity and diversity. They argue that while contract law has indeed fragmented in practice, some common principles still operate as connecting threads. For instance, ideas such as *reasonableness*, *good faith*, and *remedies for breach* appear across most contract types, even if they are applied differently.

This middle-ground perspective treats English contract law as a family of related systems — separate in detail but sharing a core conceptual structure. McBride and Bagshaw (2018) describe this as a "federation" of laws: diverse yet recognisably connected. From this view, the task of modern contract law is not to return to strict unity, but to maintain coherence within diversity.

4.4 Evaluating the Debate

The question of whether we have one law or many is not merely academic; it affects how the law develops and how it is taught and applied. If we accept the singular model, judges are encouraged to reason from broad principles and maintain consistency. But if we embrace the plural model, then legal development should focus more on context-specific fairness and policy-sensitive reasoning.

Ultimately, the debate reflects a broader tension between legal certainty and social justice. The singular approach values uniformity and predictability, while the plural approach values adaptability and fairness. Both have merit — and both capture different aspects of how contract law actually functions in modern society.

5. Implications – What Fragmentation Means for Coherence, Predictability, and Fairness

The fragmentation of English contract law has not only changed how contracts are regulated but also raised deeper questions about the values and functions of the legal system itself. If contract law is no longer a single, coherent structure, what does that mean for its ability to deliver consistency, fairness, and predictability? This section explores these implications from three main angles — coherence, predictability, and fairness — to understand both the benefits and the drawbacks of this transformation.

5.1 Coherence and Legal Consistency

One of the main concerns about fragmentation is the potential loss of coherence within English contract law. Coherence refers to the idea that legal rules and principles should fit together logically and consistently across different contexts. Under the classical system, this coherence came from

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shared doctrines — such as offer, acceptance, and consideration — which were applied uniformly to all types of contracts (Treitel, 2007).

However, as contract law has split into specialised areas, each shaped by its own policies and statutory frameworks, maintaining coherence has become more difficult. For instance, the principle of freedom of contract still dominates in commercial law, while in consumer or employment law, it is often restricted by fairness and protection-based statutes. This creates a landscape where the same concept (like “fairness” or “consent”) can mean different things depending on the type of contract.

Scholars such as Collins (1999) and Brownsword (2006) argue that this diversity undermines the notion of a unified body of contract law. Judges and practitioners may struggle to apply consistent reasoning when the underlying purposes of the law vary from one field to another. On the other hand, McKendrick (2020) suggests that complete uniformity might not be realistic or even desirable, since different kinds of contractual relationships serve different social and economic functions. Instead, the goal should be coherence through principles, not identical rules — allowing flexibility while still maintaining an underlying sense of order.

5.2 Predictability and Legal Certainty

Predictability is closely tied to coherence but focuses on the ability of people and businesses to anticipate legal outcomes. The more fragmented the system becomes, the harder it is for parties to know in advance how the courts will interpret their contracts. This uncertainty can discourage commercial activity or increase the cost of legal advice and dispute resolution.

In classical contract law, predictability was achieved through formalism — the idea that the law should apply general rules objectively, without regard to social context. For example, the rule that “a promise is binding if supported by consideration” provided a clear and stable test (Pollock, 1876). But in modern law, judges often take into account policy concerns and social context, especially in employment and consumer cases. This makes outcomes more flexible but also less certain.

The courts’ increasing use of concepts like “reasonableness” (for example, under the Unfair Contract Terms Act 1977) introduces subjectivity. What is reasonable in one context might not be in another. As Burrows (2011) points out, this growing discretion gives judges more power but reduces parties’ ability to predict outcomes with confidence. In effect, fragmentation can lead to legal pluralism, where different values coexist but do not always align neatly.

5.3 Fairness and Social Justice

Despite the concerns about coherence and predictability, fragmentation also brings positive changes — particularly in promoting fairness and social justice. One of the main criticisms of the classical model was its indifference to inequality. The idea of freedom of contract assumed that parties had equal bargaining power, which often ignored the reality of economic and social disparities.

By allowing different sectors to develop their own specialised rules, modern contract law has become more responsive to context and fairness. For instance, consumer law now protects individuals from exploitative terms, and employment law ensures fair treatment and job security. These developments recognise that not all contracts are purely private or commercial; some have strong social and moral dimensions that require protective measures (Collins, 2010).

Brownsword (2006) notes that fairness has become a defining value in contemporary contract law, replacing freedom as the central ideal. However, this shift is not without challenges — fairness can be subjective and context-dependent, making it difficult to balance against the need for predictability. The tension between fairness and certainty is therefore one of the defining features of the fragmented system.

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5.4 Balancing the Three Values

The modern law of contracts can be seen as a balancing act between coherence, predictability, and fairness. Too much emphasis on coherence and predictability may lead to rigidity and injustice, while too much focus on fairness may result in inconsistency and uncertainty. English contract law now operates within this tension, adapting to the demands of different contexts while trying to preserve some overarching principles.

As Atiyah (1979) predicted, this balance reflects a shift from a moral to a regulatory system of obligations — one that recognises the social purposes of contracting rather than treating it as a purely private affair. The challenge for the future is to ensure that this plural system remains intelligible and just, rather than becoming a patchwork of disconnected rules.

Is English Contract Law Evolving into Specialised Regimes Rather Than a Single System?

The evolution of English contract law from a unified system of general principles to a collection of specialised regimes reflects a deep shift in both legal theory and social policy. The classical vision of contract law, built on the ideals of freedom, equality, and individual responsibility, has largely given way to a more contextual and regulatory approach. Modern contract law is no longer a single, self-contained system but a set of overlapping frameworks shaped by different policy goals and moral priorities.

As Atiyah (1979) argued, there is no longer a "typical" contract that fits all situations. Employment, consumer, and domestic contracts are now governed by statutory or protective rules, while commercial contracts rely heavily on negotiated terms and industry norms. This pluralism has undoubtedly made the law more responsive to real-world inequalities and practical needs, promoting fairness and protection where freedom of contract once left people vulnerable.

However, this development comes at a cost. The growing fragmentation has weakened the coherence and predictability of English contract law. With each area following its own logic — fairness in consumer law, welfare in employment law, certainty in commerce — the unifying thread that once held the system together has become thinner. The law now resembles a network of sub-systems, linked more by shared language than by shared purpose (Collins, 1999; Brownsword, 2006).

Still, complete disunity would be both impractical and undesirable. Some general principles — such as the requirement of agreement, the concept of breach, and the idea of reasonableness — continue to run through all areas of contract law, even if they are applied differently. These principles give the law a sense of continuity and intelligibility, ensuring that English contract law remains recognisable as a single discipline, even within its diversity (McKendrick, 2020).

In the end, English contract law appears to be moving toward what might be called "a law of contracts" rather than "a law of contract." It is not a collapse of unity but a transformation of it — from a system grounded in abstract generality to one rooted in social reality. Fragmentation, when properly managed, does not destroy the discipline; it reshapes it to meet the varied and complex needs of modern society.

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