RECIPROCITY, EXCHANGE AND CONTRACT

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The imported contract law is irrelevant to most Papua New Guineans particularly to those living in villages and the urban poor. However, contract law, which provides the framework for exchange of goods and services in a capitalist, industrialised economy, does have relevance as soon as Papua New Guineans take part in commercial activity. And since commercial activity is regarded by many Papua New Guineans as The Way to Get Ahead, and since growth of G.N.P. can be brought about by increasing commercial activity, the law of contract will become correspondingly more important in this country and will affect more and more people.[1]

The importation of a law of contract has not introduced a totally strange and unfamiliar phenomenon to this country. Exchange activity and the resolution when necessary of conflicts arising from such activity is, and has been for a long time, an integral part of life at the village level.

A distinction must be drawn between three kinds of exchange activity: reciprocity; customary exchange other than reciprocity, usually by way of barter; and contract. Imported contract is relevant to the third kind; reciprocity and exchange are governed by custom.

Reciprocity[1a]

Reciprocity involves in various forms a complicated,

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1 I am not here concerned to comment on whether growth of G.N.P. is the right path for Papua New Guinea. I simply take it as given at present that such growth is an important aspect of government policy, though there are indicators, particularly in the Eight Point Plan, that growth of G.N.P. is not necessarily accepted as the most important goal for a developing country.

1a I am grateful to Professor Andrew Strathern for assisting me in the preparation of this section of this article.

shifting network of reciprocal obligations that continues over time. Such a network can operate on an intra-village or inter-village basis, and involve reciprocal obligations between individuals or groups.[2] It is not the purpose of this article to examine the many systems which exist in and around Papua New Guinea. Some of these have been written about by experts.[3] These systems range from the highly-developed, mechanistic[4] type governed by explicit rules such as the *kula* of the Trobriand Islands,[5] the *moka* of the Hagen area,[6] the Enga *tee*[7] and the *abutu* of Goodenough Island[8], to the more organic types which can be described simply as the processes of day-to-day life which make for cooperation and mutual aid. This distinction between mechanistic and organic

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2 For an interesting discussion of the different levels and types of reciprocity, see: Salisbury, R.F. *From Stone to Steel*, (1962); Rappaport, R.A. *Pigs for the Ancestors*, (1967); and Strathern, A.J. in *The Rope of Moka* (1971) pp. 111-114.

3 See the bibliography in Strathern, A.J. *The Rope of Moka* (1971) pp. 244-247.

4 The use of the words "mechanistic" and "organic" is an adaption from organisation theory. Briefly, the word mechanistic for my purposes means highly-structured, governed by rules that have been thoroughly developed, in which roles are carefully defined. Organic means loosely-structured, governed by few rules, in which roles are shifting and ill-defined.

For the use of these works in organisation theory, see: Burns, T. & Stalker, G.M. *The Management of Innovation* (1961).

5 Malinowski, B.C. *Argonauts of the Western Pacific* (1922).

6 Strathern, A.J. *Op. cit.*

7 See: Strathern, A.J. *Op. cit.* pp. 54, 114, 121, 131, 133, 134. Strathern, 'Finance and Production: Two Strategies in New Guinea Highlands Exchange Systems.' 40 *OCEANIA* 42 (1969-70).

8 Young, M.W. *Fighting with Food*, (1971).

systems of reciprocity is found not only contrasting the reciprocity systems of one people with those of another, but also within one people by contrasting important occasions, such as birth, death and marriage with ordinary day-to-day existence. Mechanistic reciprocity (particularly gift exchange) occurs on these important occasions, the exchanges that accompany payment of bride price providing an obvious example.

The major differences between imported contract and the reciprocity system are listed in Table One. A warning is necessary. Generalisations are unavoidable in this sort of discussion. Accordingly some of the statements in the table are not true for all types of contract or reciprocity. Where necessary, qualifications are made in footnotes. Further, some of the statements, particularly those relating to reciprocity, must be construed as tendencies rather than as definitive.

Mauss is among the anthropologists who have made value judgments about the two systems, finding the commercial system wanting:[9]

> "Mauss is telling us, quite pointedly, ... how much we have lost, whatever we may have otherwise gained, by the substitution of a rational economic system for a system in which exchange of goods was not a mechanical but a moral transaction, bringing about and maintaining human, personal relationships between individuals and groups."[10]

Mauss contrasts the interestedness of participants in a gift exchange with the interestedness of businessmen in contract and finds the gift exchange more elevating, despite the fact that gift exchange is often aimed at humiliating the other party[11] or is intensely competitive.[12] Mauss is most

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9 Mauss, M. *The Gift* (1954). Transl. by I. Cunnison.

10 Evans-Pritchard, "Introduction" to Mauss, M. *Op. cit.* p. ix.

11 *Idem.* at p. 73.

12 Strathern, A.J. *The Rope of Moka*, at p. 1.

TABLE I

Contract		Reciprocity
Each transactions is bilateral.	*	Each transaction is unilateral.[a]
Bargaining often precedes formation of contract.	*	No explicit bargaining.[b]
Parties are free to enter or not to enter into relationships of contract.	*	In many, but not all, exchange relationships, there is a degree of constraint to enter such relationships.[c]
Need not be face-to-face.	*	Must be face-to-face.
Aim is invariably to maximize returns.	*	Aim may be to maximize material returns but in addition most important aims are to gain prestige (specific and general) and/or to compensate the other party.
Serves very limited purposes, viz. to exchange goods or services.	*	Often serves both intrinsic purposes (e.g. aesthetic) and extrinsic purposes (e.g. political purposes such as reducing hostility, social purposes such as providing inter-group intercourse, and economic purposes.)
Obligations are explicit and expressed verbally.	*	Obligations are more implicit and governed by long-established rules.[d]
The transaction is not intrinsically important. The subject-matter of the transaction has no importance outside of what it is wanted for by the transferee.	*	The transaction is intrinsically important. The subject-matter can have spiritual significance or 'personality'.[e]
Non-ceremonial. Not aesthetically gratifying.[f]	*	Ceremonial - satisfies (inter alia) important aesthetic purposes.

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a Thus for an understanding of the reciprocity system, one must observe a whole series of transactions.

b The *ideal* is not to bargain. But sometimes bargaining does occur. In the *moka* system, when bargaining occurs, it is a sign that something is going wrong.

c For instance, in the Moka system, there is an obligation to enter into exchange relationships with one's wife's people or when compensation is called for after a death. However, men are also quite free to enter into exchange relationships of their choice.

d Again, as in b (above) obligations are sometimes explicitly spelled out.

e See Mauss, M. *The Gift* (1954) London: Cohen & West Ltd. Transl. by I. Cunnison pp. 8-10.

f It could be argued that some sorts of contracts are ceremonial and aesthetically gratifying e.g. marriage and the negotiation of international big-business contracts. I would treat these as exceptional.

convincing in his judgment on the two systems when he points out the aesthetic value of the gift exchange system - something which contract certainly lacks.

> "....the dances performed, the songs and shows, the dramatic representations given between camps or partners, the objects made, used, decorated, polished, amassed and transmitted with affection, received with joy, given away in triumph, the feasts in which everyone participates - all these, the food, objects and services, are the source of aesthetic emotions as well as emotions aroused by interest."13

What is important, for the purposes of this article, is that the reciprocity system, like contract, achieves the goal of exchanging goods and services. But unlike contract, it does much more than this. The highly developed reciprocity systems, such as the *moka*, achieve not only economic ends, but also very important political and social ends. In fact it could be said that the political and social functions are the important tasks of highly developed reciprocity systems in that the existence of such systems with their accompanying ceremonies, speech-making, bargaining, dancing and so on provides the way for people and groups in a given area to "come to terms" with each

13 Mauss, M. *Op. cit.* p. 77.

other.[14] The less-developed, lower-level organic reciprocity systems are closer to contract in that their main activity is the exchange of goods and services. But still, unlike contract, social goals are achieved because reciprocity maintains and reinforces ties between individuals and groups. Mauss' comment on reciprocity is apt: "Thus we see that a part of mankind, wealthy, hard-working and creating large surpluses, exchanges vast amounts in ways and for reasons other than those with which we are familiar from our own societies."[15]

Customary Exchange

Reciprocity is a form of customary exchange, but I am concerned here with exchanges whose primary function is to exchange goods or services solely because each party wants what the other party has to offer. This sort of exchange has existed traditionally and is analogous to contract. It differs from reciprocity in that it does not occur within a ceremonial framework. It differs from contract in that it is not supported or governed by the panoply of the courts system. Though a bargain may be binding, it cannot be enforced except through personal or social sanctions. Disputes must be sorted out by the parties to the exchange or their peers.

Customary exchange has usually been by way of barter, for example, when coastal people exchange fish for vegetables with people from inland. As villages become involved in the cash system, transactions gradually become cash sales rather than barter. This symptom of the process of westernisation raises vital questions in relation to customary exchanges. When does the law of contract become applicable? Does an exchange become a legally enforceable contract automatically irrespective of the will of the parties? Or can the parties choose whether to settle disputes in the customary manner - usually by way of conciliation through village leaders - or to resort to the courts? Obviously the imposition of contract law upon customary exchanges is not compulsory, but if one party wishes to resort to the court, should the other party be forced into this alien system?

Why, it may be asked, should a dispute arising out of an exchange at village level ever be taken to a court? This could happen if what goes wrong is sufficiently serious, or

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14 Strathern, A.J. *Op. cit.* p.214.

15 Mauss, M. *Op. cit.* p.31.

if the exchange involves an outboard motor or other subject-matter unlike the normal customary goods. As types of exchange alter, customary dispute settlement procedures may become strained to the extent that they can no longer cope. In such circumstances, a dispute may be taken to the Local Court. Such an exchange, if a cash transaction, would be governed by the *Goods Ordinance*.[16]

The problems raised by these questions will be looked at from the point of view of contract law itself and from the point of view of customary law. Finally, the present legislative framework will be examined to see if it allows for a possible solution.

Contract Law vs. Customary Law

The law of contract does cater for this sort of problem in a limited way. If there is a lack of intention to create legal relations, then a court will not enforce what would otherwise be a contract.[16a] The plea of lack of intention to create legal relations is usually raised in domestic situations. It would be desirable to extend its scope to cover small-scale exchanges made at the village level. A court would then have to decide whether to declare itself an inappropriate body to adjudicate on the matter. It can do so only if the plea of no intention to create legal relations is specifically pleaded by the defendant. In any case, it seems to me that neither treating the case as a fully-fledged contract case nor declining to adjudicate on the dispute is the right solution.

The court does have power under ss. 6(1) and 8(g) of the *Native Customs* (Recognition) *Ordinance* 1963 to settle the dispute without reference to contract law. Section 6(1) provides that "native custom shall be recognised and enforced by, and may be pleaded in, all courts" so long as it is not inconsistent with any legislative provisions or with justice or the public interest. Section 8(g) provides that native custom shall be taken into account in relation to "a transaction which the parties intended should be, or which justice requires should be, regulated wholly or partly by native custom and not by law."

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16 See s. 6(1) of the *Goods Ordinance*, 1951.

16a *Balfour v. Balfour* [1919] 2 K.B. 571.

But these provisions are useful only if there is a native custom which is applicable. In the area of customary exchange (other than reciprocity) customary law plays a procedural rather than a substantive role.[17] Thus the value of ss. 6(1) and 8(g) is quite limited, because the very taking of the dispute to a court may amount to an admission by the parties that the dispute between them could not be resolved by customary procedures.

The problem is not which of two systems of law should prevail, so much as whether the common law can be realistically applied, given that the customary law cannot solve the dispute. Must the *whole* of contract law apply? The problem here is that a "see-saw" effect (when a court, concluding that the dispute cannot be settled by customary means, goes wholly the other way and applies the law of contract *in toto*) is not in the interests of convenience or justice. Many of the technicalities of contract law are alien to Papua New Guinean villagers. I can think of nothing so bizarre as, for example, an argument over whether there is a collateral contract and the admissability of parol evidence determining the rights of two bewildered parties. What is needed is a court equipped to apply contract law whenever customary law cannot successfully solve the dispute, but a contract law not bogged down with technicalities.

Current Legislation.

Do the reception provisions allow a modified or simplified contract law to be applied? Section 4 of the *Courts and Laws Adopting Ordinance (Amended)* 1889, which relates to Papua, states, "The principles and rules of common law and equity . . . shall so far as the same shall be applicable to the circumstances of the Possession . . ." be in force in Papua. In New Guinea, s. 16 of the *Laws Repeal and Adopting Ordinance* 1921-1923 is in similar terms. "The principles and rules of common law and equity . . . shall be in force in the Territory . . . so far as the same are applicable to the circumstances of the Territory . . ." On one interpretation the wording of these provisions seems clearly to allow modifications to be made to the rules of common law and equity so as to suit them to local circumstances. But a narrower interpretation of these sections would force a court into an all-

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17 I would welcome correction on this point. My view has been formed more on the basis of intuition than on solid evidence.

or-nothing decision: if a particular rule of common law or equity is suitable then it must be applied *in toto*; if it is in any way not suitable to the circumstances then it should not apply at all.[18] In any case a court may well not be impressed by the argument that complexity and technicality alone render rules unsuitable to local circumstances, and might well answer along the lines, "If you are going to get involved in commercial dealings, then you must be prepared like any businessman to be bewildered in court; what is sauce for the goose is sauce for the gander."

Will the proposed *Village Courts Bill* 1973 offer a solution? The village courts scheme is designed to combine traditional dispute settlement procedures with the courts system. Division 4 of Part III of the Bill specifically allows for mediatory jurisdiction. Subdivision D of Division 5 of Part III of the Bill permits the application of any relevant native custom;[19] and it stipulates, "In exercising its jurisdiction under this Division, a village court is not bound by any law other than this Ordinance that is not expressly applied to it, but shall ... decide any matter before it in accordance with substantial justice."[20] This section would allow the court to draw on any relevant or useful doctrines of contract law, but not to be hobbled with the complications and technicalities of contract law. It is envisaged that, in the main, a village court would not in fact draw on any contract doctrines but would arrive at a compromise solution without their aid. But the limited point that is being made here is that they are available if they are needed, and they can be used selectively without the see-saw effect mentioned earlier.

In relation to other courts in the hierarchy, an interesting possibility arises out of ss. 8 and 9 of the *Transactions with Natives Ordinance*, 1958-1963. Section 8 is

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18 This has certainly been the approach of the Supreme Court so far. It has not yet considered whether these sections can be used to *modify* the doctrines of common law and equity. See: *Booth v. Booth* (1935) 53 C.L.R.I. *Murray v. Brown River Timber Co. Ltd.* [1964] P.& N.G.L.R. 167. *In the Matter of the Estate Re Johns* (Supreme Court judgment no. 618 of 29 April 1971.)

19 S. 29(1).

20 S. 30(1).

in the following terms.

> If an action is brought upon a contract by a party to the contract against another party to the contract the Court which hears the action may, whether the contract has been completely executed by all parties thereto or not, ignore the terms of the contract and give such a verdict as the Court considers equitable.

A "contract", for the purposes of this Ordinance, "means any contract to which a native is a party".[21] A "native" is not defined in this Ordinance but is in s. 6(1) of the *Ordinances Interpretation Ordinance* 1949-1969 as "an aboriginal inhabitant of the Territory and includes a person who follows, adheres to, or adopts the customs, or who lives after the manner of, the aboriginal inhabitants of the Territory."

Section 9 is in the following terms.

> Where it appears to the Supreme Court, a District Court or a Court of Petty Sessions that in the interests of the welfare of a native party to a job contract the contract should be terminated or varied in any way, or that the contract or the manner of its performance is in any way unjust, inequitable or unconscionable against a native party, the Court may, whether or not the contract has been completely executed by all the parties thereto or not, make such order as to termination or variation and as to the rights of the parties to the contract as it considers equitable.

A "job contract" "means a contract for the performance of a piece of work by a native or natives, other than a contract which creates the relationship of master and servant between the parties or two or more of them."[22]

These sections, if interpreted literally, seem to apply to *any* contract (to which a "native" is a party), not only to those contracts specifically contemplated by s. 6(1) of the Ordinance (basically contracts the consideration for which exceeds one hundred dollars). Therefore a court, when

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21 S. 4 of the *Transactions with Natives Ordinance* 1958-1963.

22 *Idem*.

faced with a dispute arising out of a contract to which a "native" is a party, could make any order it liked. This would effectively avoid the see-saw problem. It would allow a court to hand down a mediatory judgment. These provisions will again be examined in the next section.

The problems considered in this section arise only when customary exchange (other than reciprocity) starts to take on a "western" flavour, that is when customary exchange starts to become contract as such. The desirability of settling disputes in the environment in which they grew cannot be emphasised enough. What is of concern is the situation where disputes cannot be satisfactorily settled at the local level and the consequent danger of "contractual overkill" that can lead only to confusing and often unjust solutions.

Contract

The third kind of exchange activity, contract, will be discussed from the point of view of its suitability to Papua New Guinea. Here I am not concerned with marginal cases in which it is difficult to decide whether the exchange is traditional or one that should be governed by contract law or a modified contract law. The type of exchange discussed here is undoubtedly contract, i.e., a commercial bargain which is recognised to be in some way binding (though, as will be seen below, the assumption that both parties know the full implications of entering into a binding contract is often unrealistic). The sort of exchange envisaged is a hire-purchase contract, a contract to build a house, the purchase of an airline ticket, or a tenancy agreement.

The most troubling problem that arises here is lack of communication. If a Papua New Guinean does not understand the terms of the contract or even that he is entering into a contract (either because he is illiterate, if it is a written contract, or because he speaks a different language from the other party) should he be bound? Given the high rate of illiteracy here and the enormous diversity of languages, the problem is a very real one.

I have discussed the problem of non-communication in another article.[23] Contract law has traditionally been

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23 See: Seddon, N.C. 'The Duty of Sensitivity: The Problem of Non-Communication in Contract Law'. This article will appear in the *Australian Law Journal* in 1974.

unconcerned with the state of mind of the parties to the contract, for "the intent of a man cannot be tried, for the Devil himself knows not the intent of a man."[24] In determining the "intention" of the parties an objective test is applied. The court asks what a reasonable man would infer from the parties' behaviour. It is usually no help to a party to a contract to plead that he did not understand what the contract meant. If he shows the outward manifestations of assent to the contract either by signature[25] or by accepting a written document,[26] then he will be hard put to deny that he actually assented.

The exception in relation to signed contracts is the plea of *Non est factum*, but this plea is not readily acceded to by a court.[27] It is of limited use also because it relates only to signed documents and is therefore no help in a ticket case or where the contract is oral. Further, a successful plea of *Non est factum* renders a contract void, which can defeat the legitimate expectations of an innocent third party. In Ghana, the plea of *Non est factum* has been stretched to protect illiterates, but the same objections apply. Consequently S.K. Date-Bah looks to the equitable doctrine of unconscionable bargains for a solution to this problem.[28]

It is possible to find in common law and equitable doctrines the necessary protection for a party who has not understood the whole or part of a contract he has entered into,[29] but such an approach relies on judicial creativity, a commodity which has been compared to hens' teeth. The obvious

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24 Chief Justice Brian. See: Anon. (1478) Y.B. 17 Ed. IV, Pasch.f.1, p. 12.

25 *L'Estrange v. Graucob Ltd.* [1934] 2 K.B. 394.

26 *Thompson v. London Midland and Scottish Railway* [1930] 1 K.B. 41.

27 See: *Saunders v. Auglia Building Society* [1970] 3 All E.R. 961.

28 See: Date-Bah, 'Illiterate Parties and Written Contracts' 3 *Review of Ghana Law* 181 (1971). The leading case of *Kwamin v. Kufuor* (1914) 2 Ren. 808, P.C. and other cases applying this case are thoroughly discussed.

29 I relied heavily on the Victorian case of *Lee v. Ah Gee* [1920] V.L.R.278 in my article mentioned in footnote 23.

solution is legislative, such as the Nigerian *Illiterates Protection Ordinance*.[30] This ordinance is fully discussed by E.I. Nwogugu in an article entitled "An Examination of the Position of Illiterates in Nigerian Law".[31]

However even if legislative protection exists, there is the more fundamental problem that the protection usually does not protect. It can only protect, if at all, *ex post facto* when the disadvantaged party is taken to court and pleads his lack of understanding as a defence, but this occurs very rarely. Usually, the protective provisions are simply ignored, or, if they are observed, the matter is settled without resort to litigation and the ascendancy of one party over the other is exploited in settling the dispute. This is not an argument against having protective legislation; I merely make the point that such legislation has only a limited effect. The effectiveness of such legislation can be improved by legal services programmes, such as that operated by law students of the University of Papua New Guinea, one of the aims of which is to bring basic legal education to the villages and to the urban poor.

In Papua New Guinea, two ordinances have as their aim the protection of "natives" in contract situations (other than employment contracts): the *Trading with Natives Ordinance*, 1946-1953; and the *Transactions with Natives Ordinance*, 1958-1963.

Section 4(1) of the *Trading with Natives Ordinance* stipulates that:

> "A trader shall not, unless he is the holder of a licence, sell or offer to sell goods to, or buy or offer to buy goods from, any native."

Section 10 provides that,

> "A licensee shall not sell, or offer to sell, any goods to any native other than at the same price and upon the same terms and conditions as he sells, or offers to sell, similar goods to persons other than natives.
> Penalty: Two hundred dollars."

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30 *Laws of the Federation of Nigeria* (1958 Rev.) Cap. 83.

31 Nwogugu, 'An Examination of the Position of Illiterates in Nigerian Law' 12 *Journal of African Law* 32 (1968).

Section 11 makes it compulsory to display a price list. Section 12 stipulates that the weight of goods sold by weight must be marked on the container. Section 13 makes it illegal to refuse to sell any goods to a "native" without reasonable cause.

These provisions are anachronistic and should be repealed. They are of very limited use as protective provisions. Moreover, they do not offer protection to a person because of specific disadvantageous characteristics, such as language difficulties or illiteracy, but solely on the grounds that the person is a "native". They are based on assumptions that are an outdated hangover from the colonial era. However, the ordinance is now used by Local Councils, who have the responsibility for its enforcement, as a revenue getting device. The Local Councils issue licences, and are allowed to keep as revenue any fines imposed under the ordinance or under the subordinate regulations.[32] Therefore abolition of the ordinance will be difficult, and should include exploration of other sources of revenue for local government.

The basic scheme of the *Transactions with Natives Ordinance* is to offer protection, again to "natives" *because* they are "natives", by requiring contracts that involve a consideration in excess of one hundred dollars to be put in writing. Section 6 requires that these contracts contain the names and residences of the parties and what is to be done under the contract. In addition job contracts to which the section applies must be approved by an authorised officer. Failure to comply means that the contract "is unenforceable as against any party thereto."

Merely getting the parties to put their contract in writing does not mean that serious misunderstandings will be avoided, although the requirement in the case of job contracts that parties must take their contract to an authorised officer (usually a District Commissioner or District Officer) may force the parties to establish their agreement on a basis of common understanding. To this extent some protection will be given.

As I noted above, protective legislation is useful only if the parties go to court or are in some other way forced to comply with the protective provisions, a problem that applies particularly to the *Transactions with Natives Ordinance*. Each year, there must be thousands of transactions

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32 *Trading with Natives Regulations*, 1949-1955.

that come within the definition of "contract" in s. 4 of the ordinance but do not comply with s. 6, yet I could find not one case in which the *Transactions with Natives Ordinance* has been mentioned or discussed. It could be argued that the ordinance does its work silently, that these cases have not come to court because a party who has taken advantage of the other's lack of understanding is advised that he has an unenforceable contract and would lose in court. But this argument ignores the various ways in which the ordinance could be a help or a hindrance: the real value of the ordinance is found in ss. 8 and 9, and these are of use only if the dispute goes to court.

There are some technical questions raised by the ordinance. First, do ss. 8 and 9 apply to *any* contract to which a "native" is a party or are they restricted to contracts to which s. 6 applies, *viz.* substantial contracts? The wording of ss. 8 and 9 is not limited to substantial contracts. Thus, a Papua New Guinean could be entitled to the benefits of these sections in connection with any contract he makes, whatever the amount of the consideration involved, or even if the transaction was one of barter.

A related problem is whether the provisions of ss. 8 and 9 apply to contracts that have not complied with s. 6 and are therefore "unenforceable as against any party thereto". Unenforceability means that a court will not compensate a complainant for breach of contract. However, this does not necessarily mean that a contract is ineffective. If it is executed, it will be effective to pass title to goods. Thus, unenforceability can be to a party's advantage or disadvantage, depending on the circumstances, and can produce either a just or an unjust result. Therefore, it would be desirable for ss. 8 and 9 to be construed so as to permit the court to order an equitable solution even where the contract has not complied with s. 6. The wording of ss. 8 and 9 does allow for this interpretation, since it can easily be argued that a court, when exercising its function under s. 8 or s. 9 is not *enforcing* the contract, but imposing its own solution which, even where such solution is substantially congruent with the terms of the contract, is still different from merely enforcing a contract.

The *Transactions with Natives Ordinance* should be repealed, for reasons similar to those given above in connection with the *Trading with Natives Ordinance*. Sections 8 and 9 are powerful provisions and could, if exploited properly, be most helpful. But they must be available for the right reasons, namely, that one party is in a disadvantageous

position. To assume that all Papua New Guineans are in a disadvantageous position is arrogant in the extreme.

The legislative solution to the problem could be achieved by drafting provisions similar to ss. 8 and 9 of the *Transactions with Native Ordinance*. The provisions would be available in certain carefully defined circumstances and not simply because one of the parties to the contract is a "native". The provisions should be applicable where one of the parties is illiterate; where one of the parties' lack of education causes him not to understand what the contract entails, and this should have been obvious to the other party; where one of the parties has difficulties in understanding the language in which the contract is framed, and these difficulties should have been obvious to the other party. Possibly, provision could extend protection to circumstances where one party has exploited his ascendancy over the other (i.e. in circumstances of undue influence).

These suggestions are not without precedent. I have already mentioned the Nigerian *Illiterates Protection Ordinance*. In England,[33] Australia,[34] the United States[35] and Israel,[36] legislatures have drafted protective legislation where it has become clear that old *laissez-faire* notions are inappropriate. To find a section as broad as s.9 of the *Transactions with Natives Ordinance*, one has to go no further than New South Wales where s. 88F of the *Industrial Arbitration Act* 1940-1959 gives the Industrial Commission wide powers to vary or declare void contracts of employment that are unfair, harsh, unconscionable or

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33 See, for example, the *Supply of Goods (Implied Terms) Bill* which, if passed, will disallow certain exemption clauses in consumer transactions.

34 See, for example, the *Door-to-Door (Sales) Act*, 1963-70 (Victoria).

35 See, for example, the Unconscionable Contracts or Clause section of the U.S. *Uniform Commercial Code*, s.302.

36 See, the Israeli Law on Standard Contracts, 1964. See, too, Gottschalk, "The Israeli Law of Standard Contracts", 81 *L.Q.R.* 31 (1964).

against the public interest.[37]

Mediation and Conciliation

My final point is less concrete than the discussion above. Traditional dispute settlement procedures at the village level in Papua New Guinea make use of mediation or conciliation processes. This approach is extended to the lower courts in Division 4 of Part III of the *Village Courts Bill*, 1973 and in Division 2 of Part IV of the *Local Courts Ordinance* 1963-1966. However, substantive contract law does not mix well with mediation: contract law does not, except in a few rare instances, provide for compromise solutions. A promise either is supported by good consideration or is not; it either has been broken or has not; damages either are payable or are not. Apportionment solutions to contract disputes do not exist in the common law, though they have been called for.[38] In equity, the court has a limited jurisdiction to make consequential orders.[39] This objection to contract law is not valid only for Papua New Guinea, but there is a particularly strong tradition of mediation here and the all-or-nothing solutions produced by substantive contract law do not exist happily beside this tradition. Of course, the parties to the dispute are free to settle it between themselves and arrive at a compromise, but as soon as they go to court, the rules of contract law make mediation very difficult. This is not a plea to abandon the rules of contract *in toto*, but an attempt to raise the issue so that in some areas[40] law reform can be considered. Such reform could start with the problems raised by harsh exemption clauses in standard form contracts, since exemption clauses are a stark illustration of the all-or-nothing results that the law of contract produces.

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37 See: Woods, G.D. and Stein, P.L., *Harsh and Unconscionable Contracts of Work in New South Wales* (1972).

38 See Lord Devlin in *Ingram* v. *Little* [1961] I Q.B. 31 at p. 73.

39 *Solle* v. *Butcher* [1950] I K.B. 671.

40 For example in the *Ingram* v. *Little* type of situation where the court has to decide who of two innocent parties must bear the entire loss.

Conclusions

I have made a survey of all the Supreme Court decisions (both reported and unreported) relating to contract in Papua New Guinea.[41] These are in the process of being digested at present. There are forty-six cases, none of which deal with any of the problems raised in this article - mainly because in only two of them was one or other of the litigants a Papua New Guinean.[42] I do not think this means that the problems raised in this article are either non-existent or too small to worry about. That they have not reached the Supreme Court is a problem in itself. Certainly, there are enough unsolved issues relating to contract in a Papua New Guinean context to provide material for appeals to the Supreme Court. The lack of litigation means not that potential cases are in short supply, but that injustices are not being redressed, and these will increase as commercial activity expands and affects more Papua New Guineans. One way to redress injustices is to have appropriate protective provisions that can be used effectively. Provisions can be used only if they are known about. Knowledge of legal rights and redresses can best be spread by going directly to the people. Accordingly students and others who have taken upon themselves the task of going to the villages to tell the people about the law should be vigourously encouraged.

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41 I have not been able to survey District or Local Court cases relating to contract.

42 *Manabolina Mataganadi and Others* v. *J.L. Chipper & Co. Ltd.* (Unreported Supreme Court Judgment No. 99 (1957)). *Kare Konia* v. *Wenta Wuanp* [1963] P. & N.G.L.R. 130.