Tribal Considerations in Comity and Full Faith and Credit Issues

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One of the more positive recent developments in tribal/state relations has been the increasing tendency on the part of the judicial systems of each sovereign to recognize the decisions of their counterparts.[1] This mutual respect, especially as directed toward tribal court decisions, is critical to the continued recognition of tribal courts as competent courts to resolve disputes affecting Indians as well as non-Indians.[2] Accordingly, there has been much discussion regarding the necessity of such recognition to the future of tribal adjudicatory systems.[3]

Conversely, there has been little or no discourse on the obligations of tribal courts to reciprocate with similar treatment of state court judgments. The absence of such commentary should not lead one to believe that activity is not afoot in this area. Many tribes have enacted legislation which requires their court systems to recognize state court judgments, especially in the area of domestic relations.[4]

Likewise, many tribal courts have recognized state court judgments in appropriate instances, but these decisions are not widely disseminated among attorneys not practicing in the area of Indian

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1. *See, e.g.*, Fredericks v. Eide-Kirschmann Ford, 462 N.W.2d 164 (N.D. 1990); Mexican v. Circle Bear, 370 N.W.2d 737 (S.D. 1985).

2. Despite recent United States Supreme Court decisions restricting tribal court criminal jurisdiction, a tribal court's civil jurisdiction remains broad. *See* Duro v. Reina, 495 U.S. 676, 687 (1990). The Supreme Court has recognized that tribal courts play an important role in resolving disputes between Indians and non-Indians. *See* National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987).

3. *See* Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 335-47 (1989); Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLIAMETTE L. REV. 841, 905-908 (1990).

4. For example, the Maricopa Ak-Chin Community in Arizona has enacted a full faith and credit provision in its tribal code. AK-CHIN TRIBE CODE tit. 5, § 5.7 (1980) *microformed on* Microfiche Collection of Indian Tribal Law Codes (Marian Gould Gallagher Law Library). Other tribes have enacted similar provisions. COLVILLE TRIBE CODE tit. 3.7, § 3.7.01 (1988) *microformed on* Microfiche Collection of Indian Tribal Law Codes (Marian Gould Gallagher Law Library). The author is also aware of several other tribal courts that routinely honor state court judgments without express legislative authority under the doctrine of comity.

law and they are therefore frequently overlooked.[5]

There is a critical distinction between the origins of a state court's obligation to grant deference to other court decisions as compared to the genesis of a tribal court's obligation. A state court has an obligation under the full faith and credit provisions of the federal Constitution and under federal statutes to honor the orders of sister states, federal courts and territorial courts.[6] Several courts have held that this federal obligation extends to recognizing tribal court decisions as "territorial" court decisions under section 1738 of title 28 to the United States Code.[7]

Accordingly, the exercise of comity by a state court is not the exercise of an inherent sovereign right, but instead is a recognition by the state that in the federalist scheme its exercise of authority is subordinate to that of the federal government which may dictate, even to its courts. The result, of course, is a certain degree of uniformity among state courts in honoring the judicial decrees of other courts.

Tribal courts, on the other hand, do not fit easily into the federalist scheme contemplated by the framers of the Constitution. Most are the product of the Indian Reorganization Act of 1934,[8] wherein Congress expressly permitted tribes to discard Department of Interior Courts, to enact their own laws and to be governed by them.[9] Congress has only once, by the passage of the Indian Civil Rights Act of 1968, expressly dictated to tribes what substantive and procedural laws they must afford to alleged criminals who come before them.[10] With that exception, tribes have generally had the unfettered discretion to enact whatever laws and procedures they chose to govern themselves.[11]

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5. Many tribal court decisions are compiled and disseminated in a reporter called the Indian Law Reporter published by the American Indian Lawyer Training Program, Inc.

6. U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1988).

7. *See* Lohnes v. Cloud, 254 N.W.2d 430, 433 (N.D. 1977); Sheppard v. Sheppard, 655 P.2d 895 (Idaho 1982); Jim v. CIT Financial Services, 533 P.2d 751 (N.M. 1975); *In re* Adoption of Buehl, 555 P.2d 1334 (Wash. 1976). For an excellent discussion of the cases holding that tribal courts are territorial courts under 28 U.S.C. § 1738, see Tracey v. Superior Court of Maricopa County, 810 P.2d 1030 (Ariz. 1991).

In *Lohnes*, the North Dakota Supreme Court seemed to intimate that 28 U.S.C. § 1738 mandated state court recognition of tribal decrees, but distanced itself somewhat from that position in *Fredericks* by adopting comity as the appropriate standard for judging tribal court decisions. *Lohnes*, 254 N.W.2d at 433-34; Fredericks v. Eide-Kirschmann Ford, 462 N.W.2d 164 (N.D. 1990).

8. 25 U.S.C. § 461-479 (1988).

9. Most tribes accepted the invitation and created their own court systems, although some smaller tribes are still governed by courts of Indian Offenses. *See* 25 C.F.R. § 11.1 (1991).

10. 25 U.S.C. § 1301-03 (1988).

11. Congress has the authority to abrogate a tribe's immunity and require it to apply

Most courts have recognized this and have thwarted attempts by litigants to equate tribes with states under full faith and credit statutes and similar statutes demanding comity.[12] These decisions, as well as Congress' non-interference in this area, are consistent with the present federal policy of encouraging tribal court self-development as an aspect of tribal sovereignty.[13]

A tribe's decision to exercise its inherent sovereignty and enact full faith and credit or comity legislation is dependent on several factors. First and foremost, most tribes look at the respect and deference states have afforded their institutions in making the decision. This may lead to an impasse in tribal and state court relations if neither is willing to take the initiave and recognize the others' decrees. The Idaho Supreme Court has even mentioned this impasse in resolving itself to recognize tribal court decisions.[14]

Another tribal concern is the extent to which a required recognition of state decisions would lead to an evisceration of traditional or customary law. Many tribal courts rely heavily upon traditional unwritten law to determine an outcome in a particular case. An excellent example of tribal reliance on tradition is the South Dakota Supreme Court's decision in *Mexican v. Circle Bear*.[15] In *Circle Bear*, the court was confronted with a tribal court decision concerning the custody of a dead body, which ran contrary to a plain and concise state statute.[16] The court, in upholding the tribal court decree, recognized the importance of traditional law in a tribal forum.[17]

Congress recognized the important role tradition plays in the resolution of disputes among Indian people by requiring states which accepted jurisdiction over Indian land to apply traditional law in resolving tribal disputes.[18] There is no law, however, which

certain laws, but even the Indian Civil Rights Act, 25 U.S.C. § 1301, has not done that. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

12. *See* DeMent v. Oglala Sioux Tribal Court, 874 F.2d 510, 513-14 (8th Cir. 1989) (rejecting an argument that a tribe is a state under the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A). Another federal court has held that a tribe should be treated as a state under that Act. *See In re* Larch, 872 F.2d 66, 68 (4th Cir. 1989).

13. For statutes promoting tribal sovereignty, see the Indian Financing Act of 1974, 25 U.S.C. § 1451-1543 (1988); the Indian Self Determination Act of 1975, 25 U.S.C. § 450-450n (1988); the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901-1963 (1988).

14. A footnote in *Sheppard*, indicates that the Idaho Supreme Court was concerned about a recent tribal court decision refusing to honor a state court judgment and was beseeching the tribal court to reconsider its decision. *Sheppard*, 655 P.2d at 902 n.2.

15. 370 N.W.2d 737 (S.D. 1985).

16. Mexican v. Circle Bear, 370 N.W.2d 737, 739 (S.D. 1985).

17. *Id.* at 742.

18. 28 U.S.C. § 1360(c) (1988). North Dakota has not, however, accepted jurisdiction over Indian land except in very circumscribed instances. *See* State v. Hook, 476 N.W.2d 565 (N.D. 1991).

mandates that state courts apply any type of traditional law in adjudicating disputes among Indian people. As a result, a state court may apply laws, especially in the area of family law, which starkly contradict Indian traditional values.[19] A tribal court, when confronted with a state decree premised upon state law in conflict with tribal tradition, is placed in the unenviable position of defying tradition or appearing to ignore the authority of a state court.

Of course, a state could enact a law which requires tribal law and custom to be looked to in resolving purely internal tribal disputes, should one arise within a state's jurisdiction. Such a law, however, may be frowned upon by state legislators who may feel constrained to permit its judges to apply different standards dependent upon the race of the litigants even though the concept of "Indian" has been recognized, not as a racial characteristic, but as a political status that carries with it a special relationship between Indians and the federal government.[20] Whether that political characteristic permits disparate treatment of Indians by a state is more dubious, however.[21]

Another tribal consideration in embarking on a full faith and credit policy is the extent to which state courts will honor the sovereignty of the tribe and its entities.[22] More and more frequently, tribes are starting business and political ventures which require them to operate outside of the exterior boundaries of the reservation and therefore within the realm of state authority. By doing so, a tribe is not in any way waiving its traditional immunity from suit, which it is rightfully entitled as a sovereign entity. Many states have been reluctant to acknowledge this immunity and have argued vehemently against it.[23] These perceived unwarranted encroachments upon tribal sovereignty may have a chilling effect upon the willingness of a tribe to enact full faith and credit legisla-

19. For example, most state courts would refuse to award custody of a child to a nonparent except when exceptional circumstances exist. A tribal court, however, places much more emphasis on the traditional role grandparents play in the rearing of children and would be much more inclined to grant custody to a grandparent.

20. *See* Morton v. Mancari, 417 U.S. 535, 553-54 (1974).

21. Although the *Morton* Court recognized that Indians have a special status *vis-a-vis* the federal government, it did not address the Indian-state relationship. *Morton*, 417 U.S. at 551.

This issue may arise in the education context as state-controlled institutions, such as the University of North Dakota, strive to retain their Indian preference scholarship programs in the face of recent Department of Education threats to terminate federal funding to those institutions that grant scholarships solely on the basis of race.

22. Indian tribes have historically enjoyed the common law immunity from suit enjoyed by other sovereigns. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978); A & P Steel v. Rosebud Sioux Tribe, 874 F.2d 550, 552 (8th Cir. 1989).

23. *See* Oklahoma Tax Comm'n v. Citizen Bank of Potawatomi Indian Tribe, 111 S. Ct. 905 (1991).

tion, except in limited cases. For example, a case may arise in which a state court when acting within its judicial authority refuses to acknowledge tribal sovereignty and a tribal court may be called upon to place its imprimatur upon such a decision.

This cautionary approach may be changing, however, because the federal courts, once thought of as the last great bastion of tribal rights protection, have increasingly become more hostile to tribal rights,[24] whereas many state courts have demonstrated a desire to accommodate tribal interests.[25] One state has even taken steps to issue proclamations acknowledging the status of Indian tribes as sovereign nations.[26] Such steps greatly facilitate the ultimate objective of tribal/state cooperative ventures and may well allay tribal concerns over their protections in state courts.

The last consideration discussed in this article is the recent legislative proposals to condition legislation mandating full faith and credit of tribal court decisions upon a restriction of a tribal court's jurisdiction over non-Indians and non-member Indians.[27] From a tribal perspective, this is a very negative development. These legislative efforts, promoted as pro-tribal legislation, are

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24. The Unites States Supreme Court's most recent decisions impacting upon tribal interests have almost uniformly been disappointing to tribal advocates. *See* Blatchford v. Native Village of Noatake, 111 S. Ct. 2578 (1991) (holding that Indian tribes could not sue under the 11th Amendment unless the state gave consent); County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683 (1992) (holding that counties could tax Indian lands); Duro v. Reina, 495 U.S. 676 (1990) (holding that a tribe could not assert jurisdiction over non-member Indians); Employment Div. Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) (holding that peyote use is not protected under the 1st Amendment and the state could deny unemployment benefits to employees fired for peyote use); Lyng v. Northwest Indian Cemetery Ass'n, 485 U.S. 439 (1988) (holding that even though building roads on sacred Indian grounds was against government policy, Indians had no right to sue when such roads were built). *But see* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (upheld Indian jurisdiction over adoption decree and voided state decree in favor of tribal authority).

25. *See* Tracey v. Superior Court, 810 P.2d 1030 (Ariz. 1991) (holding that tribal court is recognized as an entity under the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings); Alegria v. Redcherries, 812 P.2d 1085 (Ariz. Ct. App. 1991) (finding that father of child could not avoid subsequent tribal court custody award after having an opportunity to contest it earlier).

26. On August 4, 1989, the State of Washington and the federally recognized Indian Tribes entered into a "Centennial Accord" in which the State of Washington expressly acknowledged the sovereignty of the Indian tribes located within its borders. Centennial Accord between Recognized Tribes and State of Washington, Aug. 4, 1989, State of Washington Federally Recognized Indian Tribes [hereinafter Accord].

27. In proposed legislation that became Pub. L. No. 101-511, a law that restored to tribes criminal jurisdiction over non-member Indians lost by the decision in Duro v. Reina, many Senators, especially Senator Gorton of Washington, proposed to condition the grant of jurisdiction and full faith and credit of tribal decisions upon federal court review of tribal court decisions. Act of Nov. 5, 1990, Pub. L. No. 101-511, 104 Stat. 1892 (codified as amended at 25 U.S.C. § 1301(2) (1992)). That provision was not included in the bill because of ardent tribal opposition. Other bills involving tribal courts, such as the Judicial Enhancement Act and the Indian Tribal Courts Act of 1991, are also in the Congress. S. 667, 102d Cong., 1st Sess. (1991); S. 752, 102d Cong., 1st Sess. (1991).

nothing more than naked attempts to emasculate tribal sovereignty under the guise of strengthening tribal courts. Most tribes are opposed to legislation which effectively allows a federal court to oversee the operations of tribal court systems because this would constitute a huge intrusion into the rights of sovereign power.

Congress should not be the ultimate arbiter in reaching resolutions between states and tribes on issues of full faith and credit. Only when states afford the tribes the respect due a sovereign entity and when the tribes reciprocate with similar treatment will comity and full faith and credit become a permanent fixture on the legal landscape.