Washington Law Review

Volume 33 | Number 3

9-1-1958

Extent of Washington Criminal Jurisdiction Over Indians

Allen Lane Carr

Stanley M. Johanson

COMMENTS

EXTENT OF WASHINGTON CRIMINAL JURISDICTION OVER INDIANS

ALLEN LANE CARR
STANLEY M. JOHANSON

The case of *In re Andy*,[1] a 1956 decision of the Washington Supreme Court, demonstrated that there are approximately 15,000 persons in the state of Washington who are not amenable to criminal prosecution under state law in certain situations, and in many instances are not amenable to either state or federal prosecution. These 15,000 persons[2] are the Indians who live in our state but who reside in "Indian country" and have retained their status as wards of the federal government. The problem of investigating and prosecuting crimes committed by these Indians has confronted and frustrated both state and federal law enforcement officers for over sixty years. It is a problem which was, until 1953, shared by at least thirteen states where, as here, Indians comprise a substantial portion of the population.

Reduced to its simplest terms, the problem is this: The state, which has the investigatory and judicial system equipped to handle the prosecution of criminal offenses committed by Indians, cannot prosecute in most instances, because the state has no jurisdiction over crimes committed by Indians in Indian country. Several thousand square miles of our state are within the boundaries of Indian country.[3] Crimes by Indians on this land cannot be prosecuted in state courts.

As to such offenses, the federal courts have jurisdiction only over those crimes listed in the "Ten Major Crimes Act."[4] As to the remain-

[1] 49 Wn.2d 449, 302 P.2d 963 (1956).

[2] Estimated population of Indians in the State of Washington as of June 1, 1957 (number of Indians on Indian rolls):

Chehalis	50	Nisqually	62	Shoalwater	.....
Colville	3,757	Ozette	.....	Skokomish	237
Hoh	20	Port Gamble	130	Spokane	1,090
Lower Elwha	85	Port Madison	180	Squaxin Island	29
Lummi	830	Puyallup	490	Swinomish	348
Makah	544	Quileute	281	Tulalip	765
Muckleshoot	290	Quinault	1,928	Yakima	3,598

Figures obtained from Western Washington Indian Agency, United States Department of Interior—Bureau of Indian Affairs, Everett, Washington.

[3] 2,800,000 acres of land are within the boundaries of Indian reservations in Washington. The Yakima reservation contains 1,100,000 acres, or 1,730 square miles. The Colville reservation contains 1,360,000 acres, of which 1,100,000 acres are either tribal or individual trust land, the balance being 260,000 acres of alienated land. Information obtained from Western Washington Indian Agency, note 2 *supra;* Yakima Indian Agency, Toppenish; Colville Indian Agency, Nespelem, Washington.

[4] 18 U.S.C. § 1153 (1952). The "Ten Major Crimes" are murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery and larceny.

ing offenses, an incredible list that includes such "lesser" crimes as assault with intent to do great bodily injury, kidnapping, and statutory rape, punishment is in theory left to the Indian tribes themselves; in practice, there often is no punishment.

The serious nature of the problem can best be shown by the *Andy* case. Joe Andy, a quarter-blood Indian, was convicted of burglary in the Yakima County superior court on March 4, 1954. The offense was committed on land which was within the boundaries of the Yakima Indian Reservation but which had been patented in fee to a non-Indian. Two years later, on April 6, 1956, Joe Andy petitioned for and was granted a writ of habeas corpus on the ground that the superior court had no jurisdiction to try the action. The court pointed out that, by federal statute, the federal government has exclusive jurisdiction over an unemancipated Indian who is alleged to have committed a crime within Indian country. Ownership of the land by a non-Indian did not affect the exclusive jurisdiction of the federal government.

Joe Andy is today a free man. Federal authorities have not brought action against him,[5] although the crime of burglary is one of the "ten major crimes" and hence cognizable by federal courts. Since Joe Andy's release from the state penitentiary, other Indians convicted of crimes in state courts have been released from the penitentiary, from the reformatory, and from county jails.[6]

Perhaps aroused by the decision handed down in the *Andy* case, the Washington state legislature, at its 1957 session, enacted a statute[7] which purports to come within the provision of a 1953 act of Congress[8] designed to transfer jurisdiction over any and all Indian crimes to state courts. In passing this legislation, however, our legislature apparently did not consider the implications of article 26, section 2, of the state constitution, in which the people of the state expressly disclaim jurisdiction over Indian lands. Further, the legislature did not heed the mandate of the congressional act that the article of our

[5] In deciding not to bring charges against Andy, the federal authorities probably took into consideration the fact that Andy had served two years in the state penitentiary.

[6] Since the Andy case, twelve Indians have been released from the Washington State Reformatory at Monroe, and one Indian has been released from the State Penitentiary at Walla Walla. Letter from Stephen C. Way, Assistant Attorney General, to the writers, June 26, 1958. No information concerning releases from county jails has been obtained.

[7] WASH. SESS. LAWS 1957, c. 240; now codified in R.C.W. 37.12.010.070.

[8] 67 STAT. 588 (1953), 18 U.S.C. § 1162 (Supp. 1958), 28 U.S.C. § 1360 (Supp. 1958).

constitution be amended before jurisdiction over Indian lands could be acquired. The probable outcome will be that the Washington statute will be declared unconstitutional when first tested. Instead of resolving the jurisdictional problems over Indian crimes, the legislature seems to have created a host of new problems.

THE TEN MAJOR CRIMES ACT

The problem of jurisdiction over Indian crimes first received nationwide attention in 1883, when the United States Supreme Court handed down its decision in the landmark case of *Ex parte Crowdog*.[9] In that case Crowdog, a member of the Choctaw tribe, had bludgeoned to death one of his fellow tribesmen with a hunting knife. The federal government attempted to prosecute, but a conviction of first degree murder was reversed by the Supreme Court, because there was no statute giving federal courts jurisdiction over crimes committed by Indians on reservations. It had previously been held by the Supreme Court that state courts had no jurisdiction to prosecute crimes committed by Indians on reservations. Thus, Crowdog could not be prosecuted, although he had admittedly committed a most heinous crime, because no court was competent to try him. The decision raised such a storm of protest[10] that in 1885 Congress passed a statute giving federal courts jurisdiction to try Indians for the crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. The statute was known as the "Seven Major Crimes Act."[11] This list of crimes has grown by congressional legislation as different crimes were committed for which, to the dismay of the public, no prosecution was possible. By 1932, the list of crimes had grown to ten. It has not been added to since that time. The ten major crimes are murder, manslaughter, assault with intent to kill, assault with a dangerous weapon, burglary, robbery, larceny, arson, rape, and incest.[12]

As a result of this federal legislation, criminal jurisdiction over Indians has been shared in the following manner:[13] As to offenses committed by Indians outside the bounds of Indian country, state courts may exercise jurisdiction just as they may as to crimes committed by non-Indians. As to crimes committed by Indians within

[9] 109 U.S. 556 (1883).
[10] For a more extensive discussion of the background of this legislation, see COHEN, HANDBOOK OF FEDERAL INDIAN LAW 146-147 (3rd ed. 1942).
[11] 23 STAT. 362, 385 (1885).
[12] 18 U.S.C. § 1153 (1952 ed.).
[13] See COHEN, HANDBOOK OF FEDERAL INDIAN LAW 358-365 (3rd ed. 1942).

Indian country, federal courts are to have jurisdiction over the crimes listed in the Ten Major Crimes Act. All other crimes are, in theory, to be handled by the individual tribes.

Problems resulting from this three-way split of jurisdiction over Indian offenses are readily apparent. In the first place, the list of "lesser" crimes not within the Ten Major Crimes Act is a bit startling. One writer has compiled the following list:[14]

(1) Assault cases that do not involve a "dangerous weapon" or where "intent to kill" cannot be proved, no matter how brutal the attack may be or how near death the victim is placed. The offenses of assault with intent to commit rape and assault with intent to do great bodily injury, if committed by an Indian within Indian country, are exempt from prosecution in both federal and state courts.

(2) Sex offenses other than rape and incest. This would include adultery, bigamy, sodomy, and seduction.

(3) Various crimes such as kidnapping, receiving stolen goods, poisoning (if the victim does not die), embezzlement, blackmail, libel, forgery, fraud, mayhem, bribery, carrying concealed weapons, disorderly conduct, and offenses against public health.

To this list, traffic offenses on major highways traveling through Indian reservations might be added, because, by statute, these highways remain part of "Indian country."[15]

The Indian tribes have authority to handle these offenses in tribal courts. But the severity of such crimes alone indicates that such courts, if they existed, could not adequately dispose of these problems. In actual practice, the Indian tribal court system is inadequate. A recent study disclosed that, of the twenty-one tribes in Washington, only five are considered to have tribal court systems capable of handling even the minor crimes.[16] Many tribes have no court systems at all. Leaving prosecution of crimes to the Indians often means that there is no prosecution at all.

Even where an adequate tribal court system does exist, there is much to be desired. Under the most comprehensive Indian tribal codes, only forty to sixty offenses are considered, as compared to the more than 2,000 offenses covered by the Washington penal code. The punishment meted out is archaic and too humane, and often does not

---

[14] *Id.* at 147.

[15] 18 U.S.C. § 1151 (1952).

[16] Report by Richard F. Broz, Office of the Attorney General, for State Attorney General Don Eastvold, October 20, 1954: "Legal Problems Concerning Indians and Their Rights Under Federal and State Laws." (Unpublished Manuscript.)

fit the crime.[17] Several generations ago, separate legal consideration of Indian offenses was perhaps necessary, because the Indian culture was distinct from the white man's culture. But this is no longer true. To a very great extent, especially in Washington, the Indian, even where he has retained his status as a ward of the federal government, has developed a culture in most respects like that of the other citizens of the state. This has come about through associating, working, and attending school with the white man. It only remains to make him amenable to the same legal system.

The first major defect of the Ten Major Crimes Act, then, is that it leaves many offenses, often of the most serious nature, to inadequate or nonexistent tribal courts. A second major defect is that it leaves many matters to federal law enforcement officers, who are not in the best position to handle them. Consider, for example, the crime of larceny. The Ten Major Crimes Act vests jurisdiction over this offense in the federal courts. The crime of larceny includes offenses of a serious nature; it also includes petty larcenies which could best be handled by local authorities or perhaps by the Indians themselves. But, as we have seen, the state is powerless to act. Moreover, the act was probably intended to vest exclusive jurisdiction over the enumerated crimes in the federal courts, thereby precluding the Indian courts from taking action on the matter.[18] Realistically, the federal authorities are not concerned with, and should not be burdened with, trivial offenses of a purely local character.

In practice, the federal authorities do not concern themselves with the minor offenses, though listed under the act. A crime will not be investigated unless called to the attention of federal authorities by the Indian agent on the reservation. If he decides not to report the offense, it will not be brought to the attention of these authorities. Even if he does report it, the Federal Bureau of Investigation, the

[17] Cohen, *op. cit. supra* at 147, notes these differences between Indian tribal codes and state penal codes:

1. The number of offenses specified in a tribal code generally runs between 40 and 50, whereas a state code (exclusive of local municipal ordinances) generally specifies between 800 and 2,000 offenses.
2. The maximum punishment specified in the Indian penal codes is generally more humane, seldom exceeding imprisonment for six months, even for offenses like kidnapping, for which state penal codes impose imprisonment for 20 years or more, or death.
3. Except for fixing a maximum penalty, the Indian penal codes leave a large discretion to the court in adjusting the penalty to the circumstances of the offense and the offender.
4. The form of punishment is typically forced labor for the benefit of the tribe or of the victim of the offense, rather than imprisonment.

[18] See Cohen, *op. cit. supra* at 147.

authorized government investigating agency, may not wish to investigate or may be unable to do so because of an inadequate staff. In a conversation with the writers, an agent of the Seattle office of the Federal Bureau of Investigation commented that the Ten Major Crimes Act in effect requires that the F.B.I. do local police work. He pointed out that the F.B.I. was not organized for such purposes and is not equipped to handle such matters.[19]

If the Bureau does investigate the offense, the local federal attorney may not wish to prosecute or may be unable to do so for the same reasons. In three places, then, discretionary decisions can be made as to whether a case should be brought to trial. As a result, many lesser offenses go unpunished. Were these same offenses brought to the attention of the local prosecuting attorney, more concerned as he is with local law enforcement problems, there would be a greater number of prosecutions.

CONGRESSIONAL ACT OF 1953

Agitation for a change in the law resulted, in 1953, in the passage of an act of Congress[20] that would ultimately give jurisdiction over Indian offenses to all the states that have Indian lands within their limits. This would remedy the problems created by the Ten Major Crimes Act. No longer would there be an unworkable split of jurisdiction among state courts, federal courts, and Indian tribes. Instead, the Indian would be treated as any other resident of the state and would be amenable to prosecution in local courts.

Under the 1953 Act, states were treated in three separate ways. As to five states, where there existed no constitutional or other impediments to the states' exercise of jurisdiction over Indians except the Ten Major Crimes Act, the statute expressly transferred jurisdiction to the state.[21] In these five states Indians are now being prosecuted in state courts.

As to a second group of states, where authorities had indicated an unwillingness to accept jurisdiction, the act left the door open for

[19] Another problem which the F.B.I. faces arises when their investigation discloses that the criminal offense does not, or may not, fall within the enumerated "Ten Major Crimes." One unreported case involved an alleged rape of a 14-year-old girl. Investigation disclosed strong evidence of assault with attempt to commit rape but little or no evidence which would support a conviction of rape. The case was dropped, as assault with attempt to commit rape is not one of the "Ten Major Crimes."

[20] 67 STAT. 588 (1953), 18 U.S.C. § 1162 (Supp. 1958), 28 U.S.C. § 1360 (Supp. 1958).

[21] 18 U.S.C. § 1162(a) (Supp. 1958). The five states listed in the statute are California, Minnesota, Nebraska, Oregon, and Wisconsin.

such states to acquire jurisdiction in the future, when they wished to do so.[22]

As to a third group of eight states, including Washington,[23] the act gave the consent of the United States to acquisition of jurisdiction by the states, *provided* that the states first amend their constitution.[24] The enabling acts of these states, and consequently their state constitutions, contain express disclaimers of jurisdiction over Indian lands. As to these states, the effect of the 1953 act was to retain the exclusive federal jurisdiction over Indian lands, but it gave those states the power to acquire jurisdiction by amending their constitution or statutes so as to remove any legal impediments to the exercise of jurisdiction.

At its 1957 session, the Washington legislature enacted a statute,[25] hereinafter called chapter 240, which purported to come within the congressional act. No reference was made to the Washington constitutional provision expressly disclaiming jurisdiction over Indian lands.

THE WASHINGTON CONSTITUTION

Article 26 section 2 of the Washington constitution reads as follows:

> . . . *second;* That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian Tribes; *and that until the title thereto shall have been extinguished by the dis-*

[22] 67 STAT. 588, 590 (1953). This section of the statute is not codified, but is referred to in a note following 28 U.S.C. § 1360 (Supp. 1958). The Senate and House reports indicate that this portion of the statute refers to the state of Nevada. 2 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS, 83rd Cong., 1st Sess. 2409, 2412 (1953).

[23] The statute does not explicitly name the state to which this section of the statute refers. The effect of this statute, and the states to which it applies, are discussed in the House and Senate reports. 2 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS, 83rd Cong., 1st Sess. 2414 (1953).

> It appears that there are legal impediments to the transfer of jurisdiction over Indians on their reservations in the case of a number of States. An examination of the Federal statutes and State constitutions indicates that enabling acts for the following States, and in consequence the constitutions of these States, contain express disclaimers of jurisdiction. These States are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and *Washington.* [Emphasis supplied.] In these cases the enabling acts required the people of the proposed States expressly to disclaim jurisdiction over Indian land and that, until the Indian title was extinguished, the lands were to remain under the absolute jurisdiction and control of the Congress of the United States. In each instance the State constitution contains an appropriate disclaimer. It would appear in each case, therefore, that the Congress would be required to give its consent and the people of each state would be required to amend the State constitution before the State could legally assume jurisdiction.

[24] 67 STAT. 588, 590 (1953). This section of the statute is not codified, but is referred to in a note following 28 U.S.C. § 1360 (Supp. 1958).

[25] WASH. SESS. LAWS 1957, c. 240; now codified in R.C.W. 37.12.

position of the United States, the said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. (Emphasis supplied.)

A fair interpretation of this provision is that the state disclaims jurisdiction over Indian land except where ownership of the land has passed either to the state or to a non-Indian. It would seem that the disclaimer would be inoperative in cases such as the *Andy* case, *supra,* where the land had been patented in fee to a non-Indian. But where the land is owned by the Indians or the Indian tribes or is held in trust for them by the United States, the disclaimer would be effective.

The 1953 act of Congress did not, of course, extinguish title to Indian lands. The act left title to Indian lands exactly where it was—with the Indians and/or the United States. The only effect of the act was to give jurisdiction over Indian offenses to some states and to allow assumption of jurisdiction by other states, including Washington. In view of this, it would seem that the end result of the legislature's failure to consider the Washington constitution in passing chapter 240 will be to bring greater confusion to an area of law enforcement already beset with serious practical problems.

As to lands owned by Indians and/or the United States, the constitutional disclaimer should still apply to prevent the state's exercise of jurisdiction over Indian offenses alleged to have been committed on such lands—notwithstanding chapter 240. As to land now owned by the state or a non-Indian, it is arguable that the constitutional disclaimer does *not* bar assumption of jurisdiction by the state. But the legislature, inasmuch as it disregarded the Washington constitution entirely, did not differentiate on the basis of ownership of lands. What will the Washington court do when the statute is tested?

The court could declare the statute constitutional in part and unconstitutional in part. The court might rule that the state can exercise jurisdiction over land now owned by the state or by non-Indians but not over lands owned by Indians or the United States. Alternatively, the court might strike down the entire statute. The latter course would probably be the most desirable, to avoid any further compounding of confusion over jurisdiction problems.

It might be argued with some force that article 26, section 2, of the constitution does *not* bar the state from exercising jurisdiction over offenses committed by Indians on Indian or federally owned lands. This argument would be supported by a number of Washington cases

which have held that non-Indians who commit offenses on Indian lands are amenable to state criminal prosecution,[26] and by a number of cases which have gone so far as to hold that non-enrolled Indians (those who have given up their status as wards of the federal government) are amenable to state criminal prosecution.[27] It will be observed that the disclaimer clause in the constitution makes no distinction between Indians and non-Indians; on its face it appears to be an absolute disclaimer of jurisdiction over all Indian lands. Arguendo, if the Washington Supreme Court has permitted prosecution of non-Indians and emancipated Indians in spite of this constitutional provision, why cannot non-emancipated Indians likewise be prosecuted? Before this question is answered, it is appropriate to ask another question: In view of the constitutional disclaimer, on what grounds has the court permitted the prosecution of non-Indians and emancipated Indians?

Surprisingly, the cases do not give an answer to this question. In the host of cases in which the Washington court has permitted prosecution of an offense committed on Indian lands, in only one case has the constitutional question been raised by counsel. And the answer given by the court in that case was so unsatisfactory that it seems remarkable that the question has not been relitigated.

The only Washington case the writers have found which specifically considered the constitutional question was *State v. Lindsey*,[28] decided in 1925. The court, in holding that the constitution did not bar prosecution by the state, did not give any reason for its holding, but simply cited three Washington cases[29] and a United States Supreme Court case[30] which it felt were controlling.

However, the state cases cited did not consider the constitutional question. In each of the three cases, the issue raised before the court was whether there was a federal disability which precluded the state from exercising jurisdiction. Obviously there was not; the Ten Major Crimes Act and antecedent legislation, giving federal courts exclusive jurisdiction, applied only to crimes committed by Indians. Crimes committed by non-Indians or emancipated Indians are not within the Major Crimes Act legislation, regardless of the locus of the crime.

[26] State v. Lindsey, 133 Wash. 140, 233 Pac. 327 (1925).
[27] State v. Williams, 13 Wash. 335, 43 Pac. 15 (1895); State v. Howard, 33 Wash. 250, 74 Pac. 382 (1903); State v. Smokalem, 37 Wash. 91, 79 Pac. 603 (1905).
[28] 133 Wash. 140, 233 Pac. 327 (1925).
[29] State v. Williams, 13 Wash. 335, 43 Pac. 15 (1895); State v. Howard, 33 Wash. 250, 74 Pac. 382 (1903); State v. Smokalem, 37 Wash. 91, 79 Pac. 603 (1905).
[30] Draper v. United States, 164 U.S. 240 (1896).

In all three of these earlier Washington decisions the court affirmed convictions on this ground alone.

The court, in the *Lindsey* case, felt that the case of *Draper v. United States*[31] was controlling upon the question. The court reasoned as follows: The *Draper* case had considered the Enabling Act of 1886, which act is for all purposes the same as what is now article 26, section 2, of the constitution, in connection with a Montana case.[32] In the *Draper* case the Supreme Court held (1) that the federal courts did not have jurisdiction over crimes committed by non-Indians on Indian lands and (2) that the Enabling Act could not deprive the state courts of jurisdiction, because to do so would give less than equal footing to Montana in becoming a state, in violation of the United States Constitution.

The Washington court then said that this meant that article 26, section 2, of the state constitution does not prevent the state from taking jurisdiction over such crimes, since the wording of the constitutional provision is identical with the wording of the Enabling Act.

The Washington court was correct in its interpretation of the *Draper* case. That case held that the United States did not have jurisdiction and that the Enabling Act did not prevent the state from having it. But the Washington court was mistaken in holding that the *Draper* case was controlling on the constitutional question. At the time of the *Draper* case, 1896, this prohibition of the Enabling Act was part of the Montana constitution. The court in the *Draper* case did *not* consider whether such a prohibition in the state constitution would deprive the state of jurisdiction but held only that the Enabling Act did not do so. The *Draper* case may be good law for the proposition that the United States has no jurisdiction over crimes committed by non-Indians on Indian reservations; but it is not good law for the proposition that the state constitution adopted by the people of Montana has not precluded the state from exercising such jurisdiction. Nor is it good law for the proposition that article 26, section 2, of the Washington constitution has not done so.

There have been hundreds of prosecutions in the state of Washington in which the criminal offense has been committed on Indian lands, as that term is envisaged by the state constitution. It seems

[31] *Ibid.*

[32] The Enabling Act, 25 STAT. 676 (1886), applied to the states of Washington, Montana, North Dakota, and South Dakota. All four of these states were admitted into the United States at the same time. All four states incorporated into their state constitutions the language of the Enabling Act relating to jurisdiction over Indian lands.

almost disrespectful to suggest that these prosecutions, and subsequent convictions, were unconstitutional. Still, it is interesting to speculate as to what would be the outcome if the constitutional question were relitigated today.

So far as the present article is concerned, however, the question before us in whether the *Lindsey* holding should be extended to cover prosecution of Indians who commit offenses on Indian lands. The answer would seem to be no.[33] To take the final step and hold that, as a result of the legislation passed in 1957, the state can now prosecute enrolled Indians, would emasculate article 26, section 2 completely.

However troublesome this clause of the constitution may be, it is *still* part of our constitution. As stated in the preamble to article 26: "The following ordinance shall be irrevocable without the consent of the United States *and the people of this state.*" (Emphasis supplied.) Constitutional amendment is the province of the people, not of the legislature or the courts. While there are compelling reasons for sustaining the *Lindsey* holding as applied to non-Indians and emancipated Indians,[34] there seems to be no justification for extending that holding to the present situation—unless the court finds justification in saving the legislature from an embarrassing situation.

Non-Compliance With Mandate of Congressional Act

There is a further reason why chapter 240, passed by our legislature in 1957, may be declared invalid. As discussed above,[35] the 1953 act of Congress gave special treatment to states such as Washington having constitutional disclaimers of jurisdiction over Indian lands. As to such states, the statute did not expressly transfer jurisdiction over Indian lands to state courts. Rather, the statute provided that those states could acquire jurisdicion by amending their constitu-

[33] In State v. Lohnes, —— N.Dak. ——, 69 N.W.2d 508 (1955), the supreme court of North Dakota held that a federal statute purporting to transfer jurisdiction over the criminal offenses of one Indian tribe to North Dakota courts was not effective to do so. The state could not exercise jurisdiction until the state constitution was amended by the people of the state. The court's opinion contains an able discussion of the original purpose of the "absolute disclaimer of jurisdiction" clause in North Dakota's constitution. The issue before the North Dakota court is identical with the issue that would face the Washington court if chapter 240 were challenged on constitutional grounds. See note 34 *supra.*

[34] Perhaps the most compelling reason is that, if the court were to hold otherwise, upwards of five per cent of the persons now in state penal institutions and county jails would have to be released. Much of the state, including several towns, is within the boundaries of Indian country (note 3 *supra*), and an estimate that one out of twenty convictions involved a crime committed on an Indian reservation is probably a conservative estimate.

[35] Note 23, *supra.*

tions.[36] Correctly or incorrectly, Congress decided that these constitutional provisions *must* be amended before the states could acquire jurisdiction. Acquisition of jurisdiction over Indians is conditional upon the state's amending its constitution. Until it does so, it has not come within the federal government's consent.

DELEGATION OF LEGISLATIVE AUTHORITY

In addition to the constitutional questions raised by chapter 240, the statute raises other problems, legal and practical. Chapter 240 does not attempt directly to acquire jurisdiction over Indians. In effect, it permits the Indians of each tribe to determine for themselves whether they should transfer jurisdiction to the state. Section 2 of chapter 240 reads as follows:

> Whenever the governor of this state shall receive from the tribal council or other governing body of any Indian tribe, community, band, or group in this state a resolution expressing its desire that its people and lands be subject to the criminal and civil jurisdiction of the state of Washington to the extent authorized by federal law, he shall issue within 60 days a proclamation to the effect that [the state shall have jurisdiction].

Section 3 of the act goes on to state that, after sixty days from the issuance of such proclamation, the state shall assume jurisdiction over Indian offenses and state criminal laws shall apply.

Has the legislature made an unconstitutional delegation of legislative authority to the Indians? Under the state constitution the legislature cannot delegate its power to make laws to another group or agency. As construed by our supreme court, this does not prevent the legislature from allowing some other group to either fill in the details of legislation properly enacted by the legislature, or to allow a determination of when an act shall go into effect as indicated by the vote of a local group.[37]

---

[36] 67 STAT. 588, 590 (1953):

> SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

This section of the statute is not codified, but is referred to in a note following 28 U.S.C. § 1360 (Supp. 1958).

[37] Washington law and cases concerning delegation of legislative authority are discussed in Trautman, *Administrative Law Problems of Delegation and Implementation in Washington*, 33 WASH. L. REV. 33 at 38-45 (1958).

It is within this last possibility that chapter 240 must come if it is to be sustained as a proper delegation of legislative power. The situation is somewhat analogous to problems over local option laws. As described by a leading writer, these laws leave to the vote of the people of a locality the determination of when, or whether, a law shall be applicable to them.[38] Early cases often struck down such laws as being unconstitutional delegations of legislative authority, but modernly they have been upheld.[39] A number of Washington cases have sustained matters left to the vote of local groups.[40] In all such cases, however, a purely local problem was involved, such as whether a water district should be reboundaried or a sewer district formed. None of the cases has left to the voters of a particular locality or group such a basic matter of law as is here involved. As stated in an early Massachusetts case[41] involving an act which purported to allow each county in the state to decide for itself the question of woman's suffrance, it would seem that where the problem is one of vital concern to the state as a whole, and not simply local in scope, the matter must be handled by the legislature alone and cannot be delegated. The problem of jurisdiction over Indian crimes could be so categorized.

PRACTICAL CONSIDERATIONS

Aside from the legal questions raised by permitting the Indians of each tribe to determine whether their tribe and lands shall come under state jurisdiction, the statute raises practical questions of serious import. At the time of publication of this comment, eight of the state's twenty-one tribes have elected to come under the criminal jurisdiction of the state, and have delivered a resolution to the governor in accordance with chapter 240.[42] Until the remaining tribes choose to come under the state's jurisdiction, *if they choose to do so,* the result will be the same piecemeal exercise of jurisdiction which presently exists. The sad fact is that, unless all twenty-one tribes agree to come under the state's jurisdiction, chapter 240 will have only gone part way toward the solution of the problem. For example, the eight tribes

[38] Jaffe, *Law Making by Private Groups,* 51 HARV. L. REV. 201 (1937).
[39] *Id.* at 224.
[40] State v. Storey, 51 Wash. 630, 99 Pac. 878 (1909); Spokane v. Camp, 50 Wash. 554, 97 Pac. 770 (1908); Royer v. Public Utility District No. 1, 186 Wash. 142, 56 P.2d 1302 (1936).
[41] *In re* Municipal Suffrage to Women, 160 Mass. 586, 36 N.E. 488 (1894).
[42] The eight tribes are as follows: Skokomish, Muckleshoot, Quileute, Chehalis, Nisqually, Tulalip, Suquamish, and Quinault. Letter from Warren A. Bishop, Assistant to the Governor, to the writers, June 3, 1958.

which have consented to the state's jurisdiction account for only 3,600 of the state's 14,000 enrolled Indians.

Chapter 240 allows the Indians to bring their tribes and lands under state jurisdiction by vote or resolution of the Indians themselves. But of what effect is this where more than one tribe live on a reservation, with no well-defined boundaries separating them? And where there is only one tribe on a reservation and it has voted to give jurisdiction to the state, does this bind an Indian visiting from another tribe not under the state's jurisdiction? Chapter 240 purports to allow the "tribe and lands" to be brought under the jurisdiction of the state. However, because this land is not a unique subdivision, such as a city or county, it seems questionable whether one tribe could bind a member of another tribe simply because he happens to be on that land, the terms of the act notwithstanding. Obviously, the possibilities for conflict open to a fertile mind are unlimited, and the opportunities for confusion unbridled.

CONCLUSION

It is difficult to perceive why a more direct approach to the problem of Indian crimes was not taken. The present approach is fraught with legal and practical problems which may require years of litigation to settle. As eight tribes have already been brought within the state's purported jurisdiction, it appears that this litigation will not be long in coming, with the probable result being that chapter 240 will be declared unconstitutional. And even if not, there is the grim possibility that the state's jurisdiction will apply to only a portion of the Indians in our state. The legislature's failure to consider the Washington constitution in passing chapter 240 was short-sighted; its decision to let the Indians decide for themselves whether they should come under the jurisdiction of the state was ill-considered.

The state should take positive action along the lines discussed before more of the tribes are brought within the purported jurisdiction of the state. Congress has offered the means available. The state constitution should be amended. New legislation should then be passed assuming jurisdiction over all of the Indians within the state. In this manner, the litigation will be limited to that ordinarily arising in any criminal case. If this remedial action is begun now, the state may be able to avoid the litigation which is otherwise certain to arise.