Original Jurisdiction of National Supreme Courts

Wencelas J. Wagner

Indiana University School of Law

Follow this and additional works at: https://www.repository.law.indiana.edu/facpub

Part of the Courts Commons, and the Jurisdiction Commons

Recommended Citation
https://www.repository.law.indiana.edu/facpub/2359

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
THE primary responsibility of the highest tribunal in every judicial system is to review judgments and correct errors of other courts. However, in many countries, supreme courts exercise, in rare instances, original jurisdiction, being in those cases courts of first and last instance.

THE UNITED STATES

In the United States, a constitutional provision reads as follows:

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction.¹


* Associate Professor of Law, Notre Dame Law School.

¹ U.S. Const. art. III, § 2. Thus, while the appellate jurisdiction of the Supreme Court is conferred upon it in cases involving federal questions, and therefore is based on the nature of the problem presented, its original jurisdiction “depends solely on the character of the parties . . .” California v. Southern Pacific Co., 157 U.S. 229, 257-58 (1895).
The words are couched "in an imperative sense,"\(^2\) so that Congress cannot withhold original jurisdiction, in the above-mentioned cases, from the Supreme Court. In the early years of the Union, however, there was doubt as to whether original jurisdiction of the Court can be extended by Congress. This right of Congress "was maintained by many jurists, and seems to have been entertained by the learned judges who decided Todd's case."\(^3\) But in *Marbury v. Madison*,\(^4\) Chief Justice Marshall denied this congressional power and held that all jurisdiction of the Supreme Court not classified as original in the basic law of the country must be appellate. And fifty years later, Chief Justice Taney could say that "it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the constitution, and that Congress cannot enlarge it."\(^5\)

The Constitution did not say that original jurisdiction vested in the Supreme Court should be exclusive; and, although some passages of the opinion in *Marbury v. Madison* could be understood as implying it was exclusive,\(^6\) it was early settled that Congress can make it concurrent with that of other courts. The Judiciary Act of 1789\(^7\) provided, in section 13, that while in some instances the original jurisdiction of the Supreme Court shall be exclusive, it will not be such in some others. The validity of the section was challenged, five years later, in *United States v. Ravara*,\(^8\) but sustained by a divided circuit court. A similar result was reached in subsequent cases, decided either by lower courts or the Supreme Court.\(^9\)

---


\(^3\) Note by Chief Justice Taney, following the opinion of United States v. Ferreira, 54 U.S. (13 How.) 40, 53 (1851). *United States v. Todd* was an unreported decision of the Court of 1794.

\(^4\) 5 U.S. (1 Cranch) 137 (1803).

\(^5\) Note by Chief Justice Taney, *supra* note 3, at 53.


\(^7\) 1 Stat. 73 (1789).


By virtue of the Judicial Code of 1948,10 original and exclusive jurisdiction of the Supreme Court lies in:

(1) All controversies between two or more States;

(2) All actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants, not inconsistent with the law of nations.11

Without any doubt, to adjudicate disputes between the members of the Union is the most important function of the Court in the exercise of its original jurisdiction. In general, "the importance of that jurisdiction . . . has become less and less," in spite of the fact that in the Constitutional Convention and in the ratifying conventions more of the little time devoted to discussions about the Supreme Court was spent on debates on its original than on its appellate jurisdiction.12 This original jurisdiction of the Court was "manifestly intended to be sparingly exercised," 13 and limited to causes "of a nature rarely to occur." 14 But as applied to interstate controversies, the power of the Court is of unusual weight. Hamilton rightfully stated that "the power of determining causes between two States . . . is . . . essential to the peace of the Union . . .," 15 and it is generally understood that by adopting the Constitution, the states surrendered their sovereign immunity from being sued.16 They can be sued by sister states as well as by the United States; on the other hand, the Constitution has not been understood as permitting the states to sue the Union, unless consent is given.17

10 For statutory enactments prior to 1948, see Wagner, *The Original and Exclusive Jurisdiction of the United States Supreme Court, 2 St. Louis U.L.J. 111, 114-17 (1952).
14 The Federalist No. 81, at 530 (Modern Library ed. 1888) (Hamilton).
15 The Federalist No. 80, at 517 (Modern Library ed. 1888) (Hamilton).
The conferring of mandatory jurisdiction upon the Supreme Court in controversies between the states was a marked improvement over the system in the Confederation, article IX of which provided for the settlement of such disputes by tribunals established *ad hoc*. A suggestion to accept a similar procedure in the Constitution was rejected by the Convention. The function of adjudicating controversies between states gives to the Supreme Court a special character, and it considers itself "an international, as well as a domestic tribunal." If the dispute is justiciable, the Court will deliver a judgment even if the federal law is silent on the point to be considered. The contention that the Court has no substantive law to apply was overruled by the Court in *Rhode Island v. Massachusetts*. The rules of international law are frequently resorted to by the Court.

Since the establishment of the Union, scores of important disputes between the states have been adjudicated by the Court. The Court exercised this jurisdiction for the first time in 1799. Controversies between the states, decided by the Court, are of various types, but those involving boundaries merit special mention. Jurisdiction over such disputes was upheld by the Court against the contention that they were political and not justiciable in nature. The question was definitely settled in the litigation between Rhode Island and Massachusetts in 1838. Suits brought by or against

---

18 *Scott, Judicial Settlement of Controversies Between States of the American Union* 2 (1919); *Taylor, Jurisdiction and Procedure of the Supreme Court of the United States* 8 (1905).

19 *Prescott, Drafting the Federal Constitution* 729-30 (1941).


21 *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 737, 749 (1838). For the contention of Austin and Webster, on behalf of Massachusetts, see *Rhode Island v. Massachusetts*, *supra* note 23.


the chief executive of a state acting in his official capacity are recognized as disputes between states.\textsuperscript{25}

Jurisdiction of the Supreme Court in interstate controversies is confined to disputes between sister states. Foreign states cannot be sued without their consent,\textsuperscript{26} by virtue of a well settled rule of international law, and there is little chance that any foreign state will ever consent to be sued before any court other than an international tribunal. On the other hand, the states of the Union waived their immunity from being sued only as to the sister states, and cannot be sued, without their consent, by foreign states.\textsuperscript{27}

In contrast with the jurisdiction of the Supreme Court in controversies between states, which has been exercised in over one hundred and twenty cases,\textsuperscript{28} it has never adjudicated a litigation falling in the other group of cases within its original and exclusive jurisdiction. By express statutory provisions, the Supreme Court can exercise its jurisdiction only if the rules of international law permit it. But international law makes persons enumerated in the statute immune from being sued. Included are all representatives of the governments of foreign states recognized by the United States, members of their families and households, and their servants.\textsuperscript{29} There is no immunity, however, if the suit is brought against a person employed by a foreign diplomat if he "is a citizen or inhabitant of the United States . . . and the process is founded upon a debt contracted before he entered upon such service . . .".\textsuperscript{30} In seemingly the only case in which this provision was relied upon, an inferior federal court gave a narrow interpretation to the term "debt" and dismissed the suit.\textsuperscript{31} But even if a defendant were not entitled to immunity, no federal court other than the Supreme

\textsuperscript{25}Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1860).
\textsuperscript{26}Ex parte Republic of Peru, 318 U.S. 578 (1943).
\textsuperscript{27}Monaco v. Mississippi, 292 U.S. 313 (1934).
\textsuperscript{28}Barnes, Suits Between States in the Supreme Court, 7 Vand. L. Rev. 494 (1954).
\textsuperscript{29}Wagner, The Original and Exclusive Jurisdiction of the United States Supreme Court, 2 St. Louis U.L.J. 111, 120, 123-30 (1952).
\textsuperscript{31}Carrera v. Carrera, 174 F.2d 496, aff'd, 84 U.S. App. D.C. 333 (1949). It was held that the obligation to support a child was not of the character of a debt.
Court would have jurisdiction to adjudicate the case. In
general, immunity is also accorded to diplomats accredited
to nations other than the United States, while in transit on
the American soil.\footnote{32}

The only instance in which the Supreme Court may ex-
ercise its jurisdiction in cases brought against persons en-
titled to immunity is when their privilege not to be sued is
waived. But, as the privilege is accorded not to them per-
sonally but to the nation they represent, immunity may be
waived only by the sending state.\footnote{33} In the life of nations,
such waivers are extremely rare.

In all other cases within the original jurisdiction of the
Supreme Court, this jurisdiction is not exclusive but concur-
rent with other courts. The following are included:

(1) All actions or proceedings brought by ambassadors or other pub-
lic ministers of foreign states or to which consuls or vice consuls
of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of an-
other State or against aliens.\footnote{34}

In cases in which the jurisdiction of the Supreme Court
is exclusive, the Court must exercise it when requested; \footnote{35}
otherwise, plaintiff will have no possible redress. This is not
true in cases falling within its original but concurrent juris-
diction. In such situations, the Court has held “that the
exercise of that jurisdiction is not mandatory in every case,”
and that it can refuse to pass upon the controversy “where
there has been no want of another suitable forum to which
the cause may be remitted in the interests of convenience,
efficiency and justice.” \footnote{36} Whether the jurisdiction of the

\footnote{32} Wagner, supra note 29, at 130-32.
\footnote{33} Id. at 122-23.
\footnote{34} 28 U.S.C. § 1251(b) (1952).
\footnote{35} However, in disputes between states, the Court will decline to adjudicate
the case if the problem involved is of trivial importance. “[T]he threatened
invasion of rights must be of serious magnitude and it must be established by
clear and convincing evidence.” New York v. New Jersey, 256 U.S. 296, 309
(1921). In another case, the Court went much further and suggested that it
will not exert its jurisdiction “in the absence of absolute necessity.” Alabama
Court is concurrent only with that of lower federal courts or also those of the states, depends on the provisions of statutes. Thus, in cases affecting consuls, the federal courts alone have jurisdiction; on the other hand, state courts also have jurisdiction in suits instituted by the state against citizens of other states.

As to the first group of cases within the original and concurrent jurisdiction of the Supreme Court, it should be observed that unlike foreign ambassadors and other public ministers, foreign consuls and vice consuls may be sued in tribunals other than the Supreme Court. The distinction is understandable, as consuls are not, by well recognized rules of international law, invested with the representative character. They are, however, agents of foreign governments, mainly for commercial purposes and protection of the nationals of their countries abroad and, as such, they should be granted a special treatment, if not by mandatory rules of the law of nations, then merely by comity among states.

By virtue of the second provision, the United States may be sued by the states, if it consents to the suit, in lower courts as well as in the Supreme Court, and it also may sue the states in such courts. The former rule of the Judicial Code that the Supreme Court had exclusive jurisdiction in cases where the Union sued a state no longer obtains; and, of course, it could be changed by subsequent statutory enactments making exceptions to that rule. The argument "that it should be assumed that Congress did not intend to subject a sovereign state to the inconvenience and loss of dignity involved in a trial in a district court . . ." was rejected by the Supreme Court in a case against California, arising out of a violation, by the state, of the Federal Safety Appliance Act.

The last group of cases merits a few comments. First, the party against whom a state brings a suit may not be its

---

38 Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511 (1898).
39 1 Ops. Att'y Gen. 41 (1794).
40 It is a privilege "not of the person who happens to fill that office, but of the State or government he represents." Börs v. Preston, 111 U.S. 252, 256 (1884).
41 United States v. California, 297 U.S. 175, 188-89 (1936).
own citizen; and if a state sues citizens of another state, but its own citizens should have been joined as defendants, federal jurisdiction is ousted. Discussing the rationale of the federal jurisdiction in cases between a state and citizens of another state, the Supreme Court said:

The object of vesting in the courts of the United States jurisdiction of suits by one State against the citizens of another was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens.

Obviously, this reasoning does not apply to controversies in which a state is on one side, and its citizen on the other.

Second, jurisdiction does not lie if a state is the party defendant. This limitation does not appear from the judiciary article of the Constitution, and it was early held, in Chisholm v. Georgia, that states may be sued, in the Supreme Court, by citizens of other states, and that in such suits judgments may be entered in default of appearance. Considering the clear terms of the Constitution, it seems that this result could be expected, although Hamilton did not understand the constitutional provisions as amounting to a consent, on the part of the states, to waive their immunity to be sued by private individuals, and contended that suggestions “that an assignment of the public securities of one State to the citizens of another, would enable them to prose-

---


43 New Mexico v. Lane, 243 U.S. 52 (1917); California v. Southern Pacific Co., 157 U.S. 229 (1895).

44 Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 289 (1888). A hundred years earlier, Hamilton had this to say on the topic: “The reasonableness of the agency of the national courts in cases which the State tribunals cannot be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens.” The Federalist No. 80, at 518 (Modern Library ed. 1888) (Hamilton).

45 1 U.S. (2 Dall.) 419 (1793).

46 Jackson, The Struggle for Judicial Supremacy 13 (1941).
cute that State in the federal courts for the amount of those securities..." were "without foundation." The Judiciary Act of 1789 did not seem to prohibit such suits.

The decision in Chisholm v. Georgia was accepted unfavorably by most states, and the Supreme Court was plainly defied by Georgia. Immediately, suggestions to amend the Constitution were advanced. They resulted in the adoption of the eleventh amendment, in 1798, which reads as follows:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The most important class of suits which was eliminated by the amendment was that in which states were asked to pay off their debts. The foremost argument advanced to support the amendment was that any other rule would abolish the "sovereignty" of the states. After the amendment was adopted, the Supreme Court held, in Hollingsworth v. Virginia, that it could not take jurisdiction in any of the cases similar to Chisholm v. Georgia pending before it.

The amendment was silent on suits brought by individuals against states of which they are citizens, but in Hans v. Louisiana the Supreme Court held, invoking the amendment, the views of some "great advocates and defenders of the Constitution" and "the presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution," that such suits are precluded, as "the obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the State consents to be sued, or comes itself into court...." 47

47 The Federalist No. 81, at 529 (Modern Library ed. 1888) (Hamilton). A similar view has been taken by many other outstanding proponents of the Constitution; Warren, The Supreme Court in United States History 91 (1947).
48 3 U.S. (3 Dall.) 328 (1798).
49 134 U.S. 1 (1890).
50 Id. at 14.
51 Id. at 18.
52 Id. at 20.
The eleventh amendment was sought to be by-passed by making a state the collecting agent for its citizens, so that the debtor state would be sued not by citizens of another state but by another state itself. Statutes permitting private individuals to assign their claims against sister states to their states and reserving their rights to the recovery after a successful suit against the debtor were enacted in New Hampshire and New York. However, the Supreme Court denied to the plaintiff states the standing to sue, holding that they were not the real parties in interest, that the eleventh amendment precluded such suits, as it withdrew the special remedy against the states which was granted by the Constitution, and that the Supreme Court was "prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits . . . ."

In subsequent cases, the Court held that it would not entertain a suit between two states where the purpose of the action was just "a controversy in the vindication of grievances of particular individuals," and that its jurisdiction could not be invoked "for the benefit of individuals."

Contrary to its suggestions in *Marbury v. Madison* that if the jurisdiction of the Supreme Court is, in specified cases, original, it cannot be in those cases appellate, the Court held, in later cases, that it can entertain appeals in cases over which it has original and concurrent jurisdiction, if in the first instance the controversy was adjudicated by another court.

---

54 New Hampshire v. Louisiana, 108 U.S. 76, 91 (1883). However it was held by a split Court that if an outright gift of an obligation of a state was made by a private individual to another state, the latter may bring a suit against the former. South Dakota v. North Carolina, 192 U.S. 286 (1904).

55 Louisiana v. Texas, 176 U.S. 1, 16 (1900).

56 Massachusetts v. Missouri, 308 U.S. 1, 17 (1939). However, a state has standing to sue another state as *parens patriae* with the view of protecting "the general comfort, health, or property rights of its inhabitants." North Dakota v. Minnesota, 263 U.S. 365, 375 (1923).

57 5 U.S. (1 Cranch) 137 (1801).

58 In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), the Supreme Court entertained an appeal from a state court in a case in which one of the parties was a state, and which, therefore, was covered by the constitutional clause, taken literally, conferring upon the Supreme Court original jurisdiction over the case. However, the case was a criminal one, instituted by the state: it could not have been brought in a federal court; and although "where the words confer only appellate jurisdiction, original jurisdiction is most clearly
Although the soundness of *Marbury v. Madison*, as far as it suggests the impossibility of broadening the original jurisdiction of the Supreme Court as set by the Constitution, may be doubted, it is still good law. Article III of the Constitution did not expressly authorize the Supreme Court to issue extraordinary writs; however, such writs were and are being issued by the Court. The statutory provision on the point, now in force, reads as follows:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.  

Another provision permits the Supreme Court and any justice thereof to grant writs of habeas corpus.  

Should the power of the Supreme Court to issue extraordinary writs be considered as an exercise of its original jurisdiction, it would be contrary to the Constitution, unless the understanding of the basic law as laid down in *Marbury v. Madison* is overruled. But the Court continues to recognize that “its statutory authority to issue writs of prohibition or mandamus to district courts can be constitutionally exercised only insofar as such writs are in aid of its appellate jurisdiction.” And it had the following to say about its exercise of this power:

Under the statutory provisions, the jurisdiction of this Court to issue common-law writs in aid of its appellate jurisdiction has been consistently sustained. The historic use of writs of prohibition and mandamus directed by an appellate to an inferior court has been to exert

\[\text{not given} \ldots \text{where the words admit of appellate jurisdiction}, \text{the power to take cognisance of the suit originally, does not necessarily negative the power to decide upon it on appeal, if it may originate in a different court.} \]  

*Id.* at 397-98. A few years later, Taney, speaking for a circuit court in a case brought against a British consul, stated that it was “the established law of the country” that “the grant of original jurisdiction . . . to the supreme court, did not exclude from appellate jurisdiction over the same subjects.” Gittings v. Crawford, 10 Fed. Cas. 447, 450 (No. 5465) (C.C.D. Md. 1838). Among other cases, Ames v. Kansas *ex rel.* Johnson, 111 U.S. 449 (1884), where the Supreme Court entertained an appeal from a federal court in a suit brought by a state, is well known.

62 *Ex parte* Republic of Peru, 318 U.S. 578, 582 (1943).
the revisory appellate power over the inferior court. The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when it is its duty to do so. Such has been the office of the writs when directed by this Court to district courts... In all these cases... the appellate, not the original, jurisdiction of this Court was invoked and exercised. 

Thus, the Supreme Court cannot issue extraordinary writs to private individuals against acts of administrative officers; such an exercise of its power would not be connected with its appellate jurisdiction. But even if it is directed to a lower court "in aid" of such a jurisdiction, by the issuance of the writ the Supreme Court does not review a judgment of the court below, and therefore it is difficult to see how it can be said that it merely exercises its appellate jurisdiction. Down to 1945, cases reaching the Supreme Court on extraordinary writs were put on the original docket of the Court. At present, they are placed on the miscellaneous docket, as they are "not entitled to be placed on the original or appellate docket." 

However, in cases affecting ambassadors, other public ministers or consuls, and those in which a state is a party, the Supreme Court may issue an extraordinary writ even if it is not "in aid" of its appellate jurisdiction, as the Court has original jurisdiction in such cases. 

The number of cases decided by the Supreme Court in the exercise of its original jurisdiction is very small. In six

63 Id. at 582-83. The dissenter, Justice Frankfurter, did not deny the conclusions of the majority on this point. He stated: "The issuance of such a writ is, in effect, an anticipatory review of a case that can in due course come here directly," and took the view that in the case at bar no writ of prohibition or of mandamus should be issued, as the Supreme Court "uniformly and without dissent held that it was without power to issue a writ of mandamus in a case in which it did not otherwise have appellate jurisdiction." Id. at 591-92 (dissenting opinion). In subsequent cases, the Court emphasized the discretionary nature of the writ. Wolfson, Extraordinary Writs in the Supreme Court since Ex Parte Peru, 51 Colum. L. Rev. 977 (1951).


67 Ex parte Hung Hang, 108 U.S. 552 (1883).
out of the ten years from 1945 to 1954, no such cases were filed. One was filed in 1945 and 1951, and two in 1948 and 1952.  

ARGENTINA

In Argentina, the original and exclusive jurisdiction of the Supreme Court is delimited by the constitution. While article 100 of the basic law enumerates cases within the jurisdiction of the Supreme Court "and the inferior courts of the nation," article 101 subjects them to the appellate jurisdiction of the court, and adds: "But in all cases concerning foreign ambassadors, ministers, and consuls, and in those to which a province may be a party, the jurisdiction of the court shall be original and exclusive."  

The similarity to the United States system is evident; however, the above provision is not simply copied from its North American model. The most important difference is that by virtue of the constitution itself, original jurisdiction of the court was made exclusive. Besides, by virtue of another constitutional provision, the function of fixing the boundaries of the provinces belongs to Congress, while in the United States it lies within the jurisdiction of the Supreme Court whenever there is a dispute between the states on that point.

As in the United States, it was held in Argentina that the original jurisdiction of the Supreme Court cannot be extended by legislation. In Ex parte Sojo, the first Argentine case in which a federal statute was invalidated, the Supreme Court declined to take original jurisdiction in habeas corpus proceedings, although authorized to do so by an act of Congress. The petitioner was imprisoned by the Chamber of Deputies for committing a libel against one of the representa-

---

68 Report, supra note 66, at 149.
69 In the Peronist constitution of 1949, the scope of the Supreme Court's original and exclusive jurisdiction was delimited in broader terms; article 96 vested such jurisdiction in the court "in cases arising between the Nation or a province or its inhabitants and a foreign State; in cases concerning ambassadors, ministers plenipotentiary or foreign consuls; and in cases between the Nation and one or more provinces or between the provinces."
71 32 S.C.N. 120 (1887).
tives, and obviously the court did not wish to come into a conflict with the legislature.\textsuperscript{72}

Congress permitted suits to be brought before the Supreme Court against a province by its residents or residents of other provinces. This statutory provision was attacked on the theory that in the United States such suits were prohibited by the eleventh amendment, but was upheld by the court, in \textit{Mendoza Hermanos v. San Luís} \textsuperscript{73} and \textit{Avegno v. Buenos Aires}.\textsuperscript{74}

Statutory provisions for the original and exclusive jurisdiction of the Supreme Court are found in the Judiciary Act of 1950.\textsuperscript{75} By virtue of its provisions,\textsuperscript{76} this jurisdiction includes controversies between the Federation or a province or its citizens \textsuperscript{77} and a foreign state; those concerning foreign ambassadors, ministers plenipotentiary and consuls; between the Federation and one or more provinces, or between the provinces. An action brought against a foreign state will not be acted upon by the court without securing acquiescence to the suit from the diplomatic representative of the country involved. A definition of cases concerning ambassadors and ministers plenipotentiary follows, and suits which affect their families and the personnel of the embassy or legation having a diplomatic character are included. A prerequisite for the institution of an action against any of the above persons is the obtaining of the permission of the respective government through diplomatic channels. Cases concerning consuls are defined as those involving acts or activities executed in the exercise of their official functions, whether their civil or criminal responsibility is at stake.

\textsuperscript{72} \textit{Amadeo, Argentine Constitutional Law} 75-76 (1943).
\textsuperscript{73} 1 S.C.N. 485 (1865).
\textsuperscript{74} 14 S.C.N. 425 (1874). The court said: "In order that a law duly enacted and promulgated should be declared unconstitutional it is essential that the provisions of the law be absolutely incompatible with the Constitution," which was not the case. \textit{Amadeo, op. cit. supra} note 72, at 84 n.75.
\textsuperscript{75} \textit{Law No. 13,988, Legislacion Nacional Argentina, v. II, p. 195} (1950) (hereafter cited as \textit{Judiciary Act}).
\textsuperscript{76} \textit{Judiciary Act} §24, cl. 1.
\textsuperscript{77} The inclusion of suits between citizens and foreign states does not seem to be warranted by the constitution. The Judiciary Act was enacted under the Peronist constitution.
In the Mexican constitution, two articles are devoted to the original and exclusive jurisdiction of the Supreme Court. The first one, besides providing the court with power to adjudicate controversies "between the powers of government of any state as to the constitutionality of their acts," invests it with jurisdiction "in all controversies arising between two or more states, . . . between one or more states and the federal government, and in all cases to which the federal government may be a party." The second places within the jurisdiction of the court controversies involving "all questions of jurisdiction between the federal courts, between these and those of the states, or between those of one state and those of another."

By virtue of the provisions of the Judiciary Act, in deciding the first group of cases the Supreme Court sits en banc. Statutory provisions seem to be worded in somewhat broader terms than the constitutional ones. They include, in particular:

1. Controversies between two or more "federated entities," or between the authorities of the same entity as to the constitutionality of their acts.

2. Controversies which arise out of laws or acts of federal authorities which infringe upon or restrain the sovereignty of the states, or out of laws or acts of the states which invade the scope of the federal power.

3. Controversies between a "federated entity" and the Federation.

4. Controversies to which the Federation is a party.

5. Controversies between federal or state courts and military tribunals; between federal and state courts; and between courts of two or more states.

---

78 Mex. Const. art. 105.
79 Mex. Const. art. 106.
6. Controversies submitted to the jurisdiction of the Supreme Court by labor legislation.

7. Cases involving the application of sanctions against authorities disregarding judicial proceedings determining that their acts were not warranted by law.\(^\text{81}\)

8. Questions involving disqualification of judges in matters over which the court en banc has jurisdiction.

9. Similar questions involving the President of the court.

10. Controversies between the chambers of the court.

Other matters within the jurisdiction of the Supreme Court, if not submitted to the jurisdiction of its chambers by an express provision of the law, are also to be decided by the court sitting en banc.

Besides, detailed statutory provisions submit to the court, sitting as a body, different administrative and disciplinary matters.\(^\text{82}\)

The chambers of the Supreme Court also decide some controversies as courts of first instance. Thus, the first chamber (criminal) has original jurisdiction over some criminal cases involving the issuance of the writ of amparo; over conflicts of jurisdiction between lower courts in criminal cases; over some questions relating to extradition of fugitives from justice by one state to another, or to a foreign country; and over some others.\(^\text{83}\)

Provisions regulating the original jurisdiction of the administrative, civil, and labor chamber follow the same pattern.

---

\(^{81}\) Section 11(VII) of the Judiciary Act, which makes reference to article 107(XVI) of the constitution as amended. The relevant constitutional provision reads as follows: “If, after the granting of an amparo the guilty official persists in the act or acts against which the petition for amparo was filed, or seeks to evade compliance with the judgment of the federal authority, he shall be forthwith removed from office and turned over to the respective district judge.”

\(^{82}\) JUDICIARY ACT § 12. It is composed of not less than 31 clauses.

\(^{83}\) JUDICIARY ACT § 24.
The Brazilian constitution enumerates eleven groups of cases falling within the original jurisdiction of the Federal Supreme Court. The most important of these groups include "litigation between foreign states and the Union, the states, the federal district, or the municipalities; ... conflicts of jurisdiction between ... federal tribunals, between ... federal ... tribunals and those of the states, and between ... tribunals of different states ...," and "cases and conflicts between the Union and the states or between these latter." However, suits between the Union and individuals are left, in the first instance, to the state or territorial courts.

Besides, the court has original jurisdiction over common crimes committed by the President of the Republic, the members of the court and the Attorney General. As to some high officials, federal and state, and the chiefs of diplomatic missions of permanent character the court has jurisdiction "in common crimes and in those of responsibility." Other instances of the original jurisdiction of the court include "extradition of criminals, requested by foreign states and the homologation of foreign sentences," and specified cases of habeas corpus and writs of security.

Contrary to the situation in other federations, there are no usual categories of the original jurisdiction of the Su-

---

84 BRAZ. CONST. art. 101, I.
85 Article 201 of the constitution provides: "Law suits in which the Union is the plaintiff shall be judged in the capital of the state or territory in which the other party is domiciled. Actions against the Union may be judged in the capital of the state or territory in which the plaintiff has his domicile; in the capital of the state in which the deed or fact which gave origin to the claim occurred or in which the object be situated; or again, in the federal district.
§ 1. Cases brought before other judges, if the Union shall figure therein as witness or opponent, shall come under the jurisdiction of one of the judges of the capital.
§ 2. The law may permit the action to be brought in another court, committing the judicial representation of the Union to the state public ministry."
86 BRAZ. CONST. art. 101, I.
The court may be asked to deliver advisory opinions, and in this way can be requested, for instance, to settle a dispute between the provinces if the case is not brought before the Exchequer Court. In regular judicial proceedings, the court has no original and exclusive jurisdiction in any case. The judges of the court have concurrent jurisdiction with the courts of the provinces to issue writs of habeas corpus; and if the writ is refused by the judge, or the prisoner is remanded, an appeal lies to the court. Besides, by a curious provision of the Supreme Court Act, provincial legislation may provide for removal to the Supreme Court of cases involving the question of constitutionality of legislation, federal or provincial. There is no requirement of jurisdictional amount. Here, the jurisdiction of the Supreme Court does not depend on federal but on provincial law. Some provincial statutes to that effect were enacted.

In some cases in which the supreme courts in other federal states have original jurisdiction, the court which is competent is the Exchequer Court of Canada.

**Australia**

In Australia, the High Court is the only federal court, state courts being invested with "federal jurisdiction." The question of the original jurisdiction of the High Court is strictly connected with the general problem of federal jurisdiction in Australia, and originates from the same constitutional provisions.

Taking advantage of the authority granted it by section 75 of the constitution, the Australian Parliament provided for original and exclusive jurisdiction of the High Court in a few cases, and made it concurrent with the state courts in others. By virtue of the Australian Judiciary Act, the High Court has exclusive jurisdiction in cases arising under

---

87 CAN. REV. STAT. c. 259, § 57 (1952).
89 This is true, in particular, in controversies between the provinces.
90 Australian Judiciary Act § 38, 3 COMMONWEALTH ACTS 1905-50, at 2387 (hereafter cited as JUDICIARY ACT).
treaties (however, no such case has ever arisen); in those between states or persons suing or being sued on behalf of the states; in those between the Commonwealth and the states or persons suing or being sued on behalf of them; and in those in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court.  

The meaning of "suing or being sued on behalf of the Commonwealth" was discussed by the High Court. In an unreported case of 1925 the question which was to be decided was whether a body corporate established under the War Service Homes Act, under the name of War Service Homes Commissioner, was a party "suing on behalf of the Commonwealth." Starke, J., answered this question in the affirmative on the ground that plaintiff "was but an agency or instrumentality of the Commonwealth." Relying on this conclusion and invoking the practice in the United States, the same judge held, in 1948, that the original jurisdiction of the High Court extends to a case where one of the parties is the Commonwealth Bank of Australia, managed by a Governor appointed by the Commonwealth government, having its monetary and banking policy subjected to political and governmental direction, and being, in essence, "an agency or instrumentality of the Commonwealth."

The High Court's jurisdiction over disputes between the states has been exercised in only one case, involving the boundary line between Southern Australia and Victoria.

Besides, when a constitutional inter se question arises in a litigation in a supreme court of a state, the case has to

---

92 By virtue of §75 of the constitution, the issuance of such writs, along with some other categories of cases, lies within the original jurisdiction of the High Court. Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vict. c. 12, §75 (Austl.). Thus, there is no possibility of Marbury v. Madison. Sawer, Judicial Power under the Constitution in Essays on the Australian Constitution 74, 84 n.47 (Else-Mitchell ed. 1952); Dixon, Marshall and the Australian Constitution, 29 Aust. L.J. 420, 425 (1955). The Parliament has the power to decide whether this jurisdiction should be made exclusive or concurrent.
94 Id. at 322.
95 See Nicholas, op. cit. supra note 91, at 32.
96 12 Commw. L.R. 667 (Austl. 1911); 18 Commw. L.R. 115 (Austl. 1914).
be removed to the High Court; thus, in those instances, the jurisdiction of the court is original and exclusive of the supreme courts of the states. However, the same is not true in respect to inferior state courts.

It must be observed that not in all cases in which the High Court has original jurisdiction by virtue of section 75 of the constitution, was this jurisdiction made exclusive by legislation. In the remaining cases, jurisdiction is concurrent with the courts of the states; such is the situation with suits "affecting consuls or other representatives of other countries"; those between individuals and the Commonwealth or the states (with an exception); those in which injunction is sought against a federal officer; and in diversity of residence cases.

Jurisdiction over cases brought against the Commonwealth and the states would not mean much without a statutory permission to bring such suits, in view of the common-law doctrine of the immunity of the sovereign from being sued without its permission. By an express constitutional provision, the Parliament was empowered to "make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power." 97

On the authority of the constitutional permission, the Parliament proceeded in the Judiciary Act to divest the Commonwealth and the states of their immunity to be sued in tort as well as in contract. Jurisdiction over suits brought by individuals against the Commonwealth has been vested concurrently in the High Court and the supreme courts of the states in which the claims arose. Suits by individuals against states, involving a point over which the High Court has or may have original jurisdiction by virtue of constitutional provisions, may be brought before the supreme courts of the states, and—if the High Court has been vested with original jurisdiction over the matter—in the High Court. 98

As to the suability of the Commonwealth and the states among themselves, no special legislation was necessary to

97 Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vict. c. 12, § 78 (Austl.).
98 Judiciary Act § 56.
provide for it, in the light of the express provisions of section 75 of the constitution. All that the Parliament did was to vest original jurisdiction in those cases exclusively in the High Court, as above mentioned.

It was asserted that the effect of sections 75 and 78 of the constitution and the provisions of the Judiciary Act, abolishing the immunity of the states from being sued without their consent, made them non-sovereign bodies. Even if there were such a thing as sovereignty, this statement, assuming it to be true, would be of not much importance. However, in the light of what was said previously, the whole concept of sovereignty is a fiction, and in any event it is utterly inapplicable to members of the federal states.

By virtue of section 30 of the Judiciary Act, enacted under the authority of section 76(I) of the constitution, the High Court has original jurisdiction, concurrently with the state courts, "in all matters arising under the Constitution or involving its interpretation." Naturally, a broad clause of this kind must have given rise to doubts as to the scope of its application, similar to those arising in the United States under a like provision. At first, the construction of the meaning of "involving" by the High Court was restrictive; it held, in a 1907 case, that the constitutional question should appear upon the face of the pleadings of the parties. However, recently it took a broader view of the problem. The court held in 1952, that under section 74 of the constitution, the possibility of deciding a case upon an

---

99 Australia v. New South Wales, 32 Commw. L.R. 200 (Austl. 1923). In this case, the Commonwealth sued a state in tort, for damages occasioned by a collision of ships. The defense was that the High Court had no jurisdiction to entertain the action without the consent of the defendant state. The High Court disagreed with this contention, holding (by four justices) that jurisdiction has been conferred on it by § 75(III) of the constitution. According to the fifth justice, jurisdiction has been conferred by § 58 of the Judiciary Act, enacted under the authority of § 78 of the constitution.

100 Nicholas, The Australian Constitution 375 (2d ed. 1952).

101 Judiciary Act § 30(a). By virtue of § 40(I) of the act, if the case is pending before a state court it may be removed into the High Court by an order of the latter.

102 Miller v. Haweis, [1907] 5 Commw. L.R. 89, 93: "A question of federal jurisdiction may be raised upon the face of a plaintiff's claim . . . or may be raised for the first time in the defence." Even under this restrictive view, the High Court's understanding of the term "arising under" was broader than that of the Supreme Court of the United States.
inter se question is sufficient to treat the case as a constitutional one, even if the decision is based on other grounds.\textsuperscript{103}

Similarly, acting on the authority of section 76 (III) of the constitution, the Parliament invested the High Court with jurisdiction over admiralty cases.\textsuperscript{104} Since the repeal of this statutory provision in 1939, the state supreme courts and the High Court are considered courts of admiralty by virtue of the British Colonial Courts of Admiralty Act of 1890.

The Parliament did not ever invest the High Court with original jurisdiction over cases "arising under any laws made by the Parliament," as it was authorized to do under section 76 (II) of the constitution; however, it provided for original jurisdiction of the court in a number of situations, the most comprehensive of which is over "indictable offenses against the laws of the Commonwealth,"\textsuperscript{105} and the others being specified in some statutes such as the Customs Act, the Post and Telegraph Act, and the Bankruptcy Act.\textsuperscript{106}

The last category of cases over which the Parliament has a constitutional authority to vest jurisdiction in the High Court is that "relating to the same subject-matter claimed under the laws of different States."\textsuperscript{107} This provision is similar to but broader than the clause of article III, section 2 of the Constitution of the United States vesting in the federal judicial power jurisdiction over cases "between Citizens of the same State claiming Lands under Grants of different States . . . ." The Parliament has not taken advantage of the constitutional permission; the provision itself was never construed and is considered as not readily understandable.\textsuperscript{108}

\textsuperscript{104} JUDICIARY ACT § 30A, enacted in 1914.
\textsuperscript{105} JUDICIARY ACT §30(c).
\textsuperscript{107} Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vict. c. 12 § 76(IV) (AustL).
\textsuperscript{108} "The obscurity of the . . . provision is obvious. . . ." Beasley, supra note 106, at 688 n.8. "Precisely what this means is a matter of speculation—apparently it was designed to enable the High Court to be invested with a general jurisdiction in matters of private international law in relation to the States of Australia." Wynes, The Judicial Power of the Commonwealth, 12 AUSTL. L.J. 8, 9 (1938).
As a whole, the system of the High Court’s original jurisdiction in Australia presents a curious body of rules, some of which are understandable only in the light of the country’s position within the British Commonwealth, and some others being workable only because of the small number of the member states in the Australian federation, their vast, scarcely populated areas, and slight development of interstate commerce. The selection of the subjects of the original jurisdiction of the High Court by the legislature was subjected to criticism, although it is difficult to say what changes in the existing system would be advisable.

**Switzerland**

In Switzerland, original jurisdiction of the Federal Tribunal extends to civil, criminal and “public law” cases.

In civil matters, the basic provisions are found in article 110 of the constitution which reads as follows:

The Federal Tribunal shall have civil cognizance of disputes:

1. Between the Confederation and the cantons;
2. Between the Confederation of the one part, and corporations or private individuals of the other part, when the latter are plaintiffs and the dispute reaches the degree of importance to be prescribed by federal legislation;
3. Between cantons;
4. Between cantons of the one part, and corporations or private individuals of the other part, where either party so demands and the dispute reaches the degree of importance to be prescribed by federal legislation.

The Federal Tribunal shall further take cognizance of differences in regard to loss of nationality and disputes between communes of different cantons concerning civic rights.

109 "A general review of the mode of definition of the subjects of original jurisdiction, actual and possible, of the High Court, leads to the conclusion that somewhat artificial criteria have been adopted and the practical effects of the constitution provisions have not been as satisfactory as the framers might have expected. . . ." Wynes, supra note 108, at 9-10.
The Tribunal’s jurisdiction in cases stated in article 110 is exclusive. It is not resorted to frequently; in 1950 there were ten cases.\(^{110}\)

In the Judiciary Act,\(^{111}\) the legislature indicated the categories of cases which it deemed important enough to come within the ambit of subsections 2 and 4 of article 110. In a few instances, no jurisdictional amount is required. In others, the value of the matter in controversy must amount to at least 4,000 Swiss francs.

It appears, from both subsections, that neither the Confederation nor the cantons are immune to the suits brought by individual persons against them. In any event, this immunity, well recognized at common law, does not obtain in civil law countries. It is interesting to note that subsection 2 is limited to cases where the suit is against the Confederation; thus, if the Confederation is the plaintiff, the litigation goes to cantonal courts.

For a long time, due to the fact that most “public” and administrative law disputes escaped the jurisdiction of the Federal Tribunal, there was a tendency, on the part of the Tribunal, to treat as many suits against the Confederation as possible as civil suits,\(^{112}\) and so bring them within the ambit of article 110(2) of the constitution and the relevant provisions of the Judiciary Act.\(^{113}\) With the extension of the Tribunal’s jurisdiction over public and administrative law matters this extensive interpretation of “civil matters” became unnecessary.

In suits between the cantons and individuals, the jurisdiction of the Tribunal depends on the parties: the Tribunal adjudicates the case in the first and last instance when one


\(^{111}\) §§ 41(b), 42; 95 B.S.E.I. 167 (1943); 60 Recueil des Lois Fédérales 269 (1944).

\(^{112}\) Fleiner & Giacometti, Schweizerisches Bundesstaatrecht 842 (1949).

\(^{113}\) Thus, in Geneva Streetcar Co. v. Canton of Geneva, B. Ger. 38 II 735, 737 (1912), the Tribunal classified a suit challenging the imposition of some taxes on the plaintiff as a civil case. Said the Tribunal: “On that point, the Federal Tribunal constantly recognized that in spite of the fact that a franchise, and particularly a railroad franchise, is an act of public law rather than a bilateral contract, this franchise can nevertheless create some private rights of an economic nature; in particular, the Tribunal considered as a private right the exemption from taxes set in the franchise.”
of the parties so demands. Otherwise, the cantonal courts take cognizance of the case.

In Switzerland, as in many other federations, the highest federal court was invested with jurisdiction over civil law disputes between the Confederation and the cantons, and between the cantons among themselves. In the former constitution of 1848, any dispute of this kind could reach the Tribunal only by the intermediary of the federal executive. If the Federal Council decided not to submit the dispute to the Tribunal, and did not pass upon the controversy itself, it went to the legislature. Thus, the federal executive was the judge of the Tribunal's jurisdiction. This provision, contrary to the dignity and independence of the Tribunal, was dropped from the constitution of 1874.

The importance of the last clause of article 110 can be understood only in the light of the peculiarities of the traditional Swiss system of residence. The first clause of article 43 of the constitution provides that "every citizen of the canton is a Swiss citizen." Thus, as in the United States and other federal states, there is a double citizenship. But historically, the most important "citizenship" was that of the commune in which the individual lived.

The third clause of article 43 reads as follows:

A Swiss who has settled anywhere shall enjoy at his place of domicile all the rights of citizens of the canton, together with all the rights of a burgess of the commune. Participation in the property of comunalties and corporations, and the right to vote in matters exclusively connected therewith, are excluded from these rights, unless cantonal legislation otherwise decides.

This constitutional provision grants political rights, but no communal property rights, to those admitted into residence in a commune. Historically, in order to have cantonal citizenship, it was necessary to be a "burgess," or citizen, of a commune. The communes offered assistance to their poor citizens, and possessed their own estates, forests and pastures which were for the use and enjoyment of their citizens, but

114 Swit. Const. art. 101 (1848).
115 Souriac, L'évolution de la juridiction fédérale en Suisse 244 (1909).
closed to strangers. Particularly for the rural population of Switzerland the citizenship in a commune was a very precious thing. The poor communes of the country becoming overpopulated, some of their citizens emigrated and sought to be admitted as "burgesses" by some richer ones. In hundreds of cases, individuals forfeited, by the loss of residence, their communal citizenship (and, at the same time, the cantonal citizenship) without being able to become citizens of any other. Religious differences, felt for a very long time much more strongly in Switzerland than in most other countries, were an important factor in refusing to admit members of a religious minority group into citizenship.\textsuperscript{116} But even without this factor, in many Swiss communes it was for years practically impossible for newcomers to acquire full burgess rights. The communes became ever more closed, and the number of "stateless" persons was increasing.

It was clear that no cantonal measures could cope with this problem which became a very important and difficult one in the whole country. Beginning in 1832, suggestions were advanced to regulate the fate of "stateless" persons by federal legislation, and the constitution of 1848 conferred jurisdiction over disputes relating to these questions on the Federal Tribunal. By the very fact of the transformation of a loose federation into a federal state, the question of federal citizenship was born and had to be regulated. Hence article 43 and the last clause of article 110 of the present constitution, which however do not impose on the communes the obligation to grant all property rights to the new settlers.\textsuperscript{117}

By virtue of article 114 of the constitution, the legislature was granted unrestricted power to place matters not mentioned in the basic law within the jurisdiction of the Tribunal, either original or appellate. Advantage was taken of this permission in some criminal and civil cases, and, by statutory provisions, the Tribunal is the court of first and

\textsuperscript{116} Rappard, The Government of Switzerland 11-12 (1936).
\textsuperscript{117} Historical observations on communal citizenship are taken from Souriau, supra note 115, at 186.
last instance in some cases of bankruptcy and those involving railroads.\textsuperscript{118}

Article 111 of the constitution is curious in that it permits the parties to a dispute to vest the Tribunal with jurisdiction; the text of the article is as follows:

The Federal Tribunal is bound to judge other cases when the parties agree to appeal to it and the matter in dispute is of the degree of importance to be prescribed by federal legislation.

Under the Judiciary Act,\textsuperscript{119} the jurisdictional amount has been set at 10,000 francs. In 1950, seven cases were brought before the Tribunal on the authority of the above provisions.\textsuperscript{120}

The Federal Tribunal's jurisdiction by agreement of the parties was not an innovation of the present constitution. It was first provided for in the constitution of 1848,\textsuperscript{121} which contained a further provision requiring the parties to cover all the costs of the proceedings in the Tribunal occasioned by their litigation.

Under the present scheme, the Tribunal has concurrent jurisdiction with the cantonal courts, at the election of the parties, in all cases involving 10,000 francs or more. Besides, under the same section of the Judiciary Act, the Tribunal is competent to decide in the first and last instance cases conferred upon it by cantonal constitutions or statutes, provided that the assent of the federal legislature is given. This scheme is similar to the Canadian one.

In criminal law, the original jurisdiction of the Tribunal is exercised by three of its five penal law departments.

One of these departments is called the "Criminal Chamber," and sitting with twelve jurors, constitutes the federal jury court,\textsuperscript{122} called into being by mandate of article 112

\begin{footnotes}
\footnote{118} Fleiner & Giacometti, Schweizerisches Bundesstaatrecht 834 n.8 (1949).
\footnote{119} Judiciary Act § 41(c).
\footnote{120} Hughes, The Federal Constitution of Switzerland 121 (1954).
\footnote{121} Swit. Const. art. 102 (1848).
\footnote{122} Judiciary Act § 12(1)(e) and § 1 of the code of criminal procedure as modified by Judiciary Act § 168.
\end{footnotes}
of the constitution, which vests in the Tribunal, "with the assistance of a jury to decide the facts," jurisdiction over cases involving treason, major political offenses, and a few others.\textsuperscript{123} Constitutional provisions are supplemented by those of the criminal code.\textsuperscript{124}

Cases coming under article 112 of the constitution are very rare; the last one occurred in 1933.\textsuperscript{125}

Another criminal chamber of the Tribunal, called the Federal Criminal Court,\textsuperscript{126} passes on cases not requiring a jury, in instances provided for by law, by permission of article 114 of the constitution, such as counterfeiting.\textsuperscript{127} The number of cases decided by this department is small—three or four a year.\textsuperscript{128}

The last department, called the Chamber of Accusations,\textsuperscript{129} acts like a grand jury for the previous ones, and in cases coming under the original jurisdiction of cantonal authorities, decides in which canton they should be tried in case of doubt.\textsuperscript{130} Out of about sixty cases which constitute the yearly business of this Chamber, about ninety per cent are of the latter kind.\textsuperscript{131}

By virtue of a peculiar provision of the federal code of criminal procedure, the Federal Council has the power to transfer, in particular instances, the jurisdiction over crimes which by statute are within the original jurisdiction of the

\textsuperscript{123} Article 112 enumerates:

1. Cases of high treason against the Confederation, and revolt and violence against the federal authorities;
2. Crimes and offenses against international law;
3. Crimes and political offenses which are the cause or consequence of disorders necessitating armed federal intervention;
4. Charges against official appointed by a federal authority, when brought before the tribunal by that authority.

\textsuperscript{124} Criminal code, § 265 (high treason, overthrow of the government or amending the constitution by force, etc.), § 299 (disturbance of the territory of a foreign state), § 300 (hostilities against foreign armed forces), § 341 (a few other cases).

\textsuperscript{125} Hughes, The Federal Constitution of Switzerland 122 (1954).

\textsuperscript{126} Judiciary Act § 12(1)(f).

\textsuperscript{127} §§ 340, 342 of the criminal code.

\textsuperscript{128} Hughes, op. cit. supra note 125, at 125.

\textsuperscript{129} Judiciary Act § 12(1)(d).

\textsuperscript{130} Section 264 of the code of criminal procedures, as modified by § 168 of the Judiciary Act.

\textsuperscript{131} Hughes, The Federal Constitution of Switzerland 125 (1954).
Tribunal, to cantonal courts. In these cases, the cantonal procedural law is to be applied. The whole scheme is of minor importance.

One of the nine departments of the Federal Tribunal has jurisdiction over public—constitutional and administrative—law matters.

The constitutional basis of the public law jurisdiction of the Tribunal is found in articles 113 and 114A of the constitution, article 114 leaving the legislature free to invest the Tribunal with jurisdiction over any other matter it sees fit.

In article 113, clause 1, of the constitution, it is provided that the jurisdiction of the Tribunal shall extend to:

1. Conflicts of competence between federal authorities on one side and cantonal authorities on the other side;
2. Disputes in public law between cantons.

In addition, in the third paragraph, the article includes complaints alleging violation of the constitutional rights of citizens.

The first provision of article 113 vests in the Tribunal the duty to delimit the competence of the federal and cantonal authorities. It affords protection against acts in excess of their power by any of the three branches of the cantonal governments; but if the latter are plaintiffs, they can be given remedy only against the federal executive, which very rarely happens. Private individuals are not permitted to ask the Tribunal for a remedy, under the above provision. Federal and cantonal authorities alone are proper parties to the proceedings.

The next provision of article 113 adopts the rule usually followed in federations that the supreme judicial organ of the federation has original jurisdiction over the disputes between its members. However, the Swiss system has its

---

132 Section 18.
133 Translation taken from Hughes, Op. Cit. Supra note 131, at 122.
134 The constitutional provision was supplemented by § 83(a) of the Judiciary Act.
135 The Tribunal cannot review the acts of the federal legislature.
peculiar features. A separate constitutional provision of article 110 vested in the Tribunal jurisdiction over civil law disputes between the cantons; article 113 refers to public law disputes which, if considered as administrative by the legislature, may be excluded from the competence of the Tribunal.

The idea that litigation between the members of the federation should not be resolved by force is as old as the league between three cantons which gave rise to the formation of Switzerland, under which disputes between its members were to be settled by pacific means. In the course of years, arbitration between the members of the Confederation became the established method of settling litigation. With a short interruption, such a state of affairs lasted until 1848.

Under the system of the constitution of 1848, the general rule was that civil law disputes between the cantons were decided by the Tribunal, whereas public law disputes escaped its jurisdiction.

Even today, arbitration between the cantons is recognized by the constitution as one of the methods of settling intercantonal disputes, and the Federal Council is directed to execute arbitral awards. Any recourse to force by the cantons is forbidden.

When the dispute is not legal, but involves only a conflict of interests between the cantons, and a compromise is not reached, the Federal Council takes care of the problem. But even legal disputes can be, and some actually are, submitted to the Federal Council by legislation. Before the

---

136 The earliest treaty of alliance between the three original cantons, in 1291, provided for "friendly remonstrances" between "wise men" of the three, in an attempt to settle controversies peaceably. Coolidge, The Swiss Federal Court, 4 L.Q. Rev. 409, 415-16 (1888).

137 Schindler, Administration of Justice in the Swiss Federal Court in Intercantonal Disputes, 15 Am. J. Intl. L. 149 (1921). One of the last instances of arbitration before the transformation of Switzerland into a federal state was that between Schwyz and Uri in 1845, concerning the interpretation of a treaty of 1350 between the two cantons. Id. at 151. See also Coolidge, supra note 136, at 416.

138 SVIT. CONST. art. 102(5).

139 SVIT. CONST. art. 14.

140 On the basis of articles 85(7) and (8) of the constitution. FLEINER & GIACOMETTI, SCHWEIZERISCHES BUNDESSTAATRECHT 877 (1949).

141 FLEINER & GIACOMETTI, op. cit. supra note 140, at 877. Section 83(b) of
NATIONAL SUPREME COURTS

Tribunal, the claim must be based on a rule of law; if plaintiff relies only upon considerations of equity or utility, the Tribunal will dismiss the suit. The principle of article 2 of the Swiss Civil Code, directing the judge, in cases of a gap in the law, to decide the case "according to the rule which he would establish if he were a legislator," is inapplicable to intercantonal disputes.\textsuperscript{142}

The idea of an intercantonal dispute is rather broad; it covers disputes between communes of different cantons,\textsuperscript{143} which may be nominal parties to the suit, or on behalf of which a canton may sue, or be sued. Disputes as to cantonal citizenship and questions of guardianship are expressly included by the Judiciary Act.\textsuperscript{144} Unlike the situation in the United States, cantons may also espouse claims of their citizens, provided they have an incident interest in the litigation.\textsuperscript{145}

A type of intercantonal dispute which frequently reaches the Tribunal is one involving double taxation, which is prohibited by the constitution,\textsuperscript{146} and other conflicts of competence, \textit{e.g.}, those involving questions of inheritance.\textsuperscript{147}

\textsuperscript{142} Schindler, \textit{Administration of Justice in the Swiss Federal Court in International Disputes}, 15 \textit{Am. J. Int'l L.} 149, 159 (1921).

\textsuperscript{143} This contingency is expressly provided for by article 110 of the constitution; it is lacking, however, in article 43.

\textsuperscript{144} \textit{JUDICIARY ACT} §§ 83(c), (d), (e).

\textsuperscript{145} Thus, in one of the earliest cases between the cantons the real parties in controversy were private individuals who had commercial establishments on the same stream. The litigation involved the use of the water from the stream, and was rendered acute by the fact that the parties interested based their rights on conflicting statutes of the Cantons of Aargau and Zürich. B. Ger. 4, 34 (1878). In this approach, Swiss intercantonal law is following international law and differs from the United States interstate law.

\textsuperscript{146} Swit. Const. art. 46, cl. 2: "Federal legislation will make the necessary provisions... for preventing the double taxation of a citizen." There was no similar provision in the constitution of 1848, but the Federal Assembly, acting in a judicial character, prohibited double taxation anyhow. Schindler, \textit{op. cit. supra} note 142, at 156.

\textsuperscript{147} Fleiner & Giacometti, \textit{Schweizerisches Bundesstaatrecht} 877 (1949).
Boundary disputes are next, social assistance cases forming the third important group.\footnote{For more details on intercantonal disputes, see Huber, The Intercantonal Law of Switzerland (Swiss Interstate Law), 3 Am. J. Int'l L. 62 (1909); Schindler, Administration of Justice in The Swiss Federal Court in International Disputes, 15 Am. J. Int'l L. 149 (1921).}

The year 1928 marked an important change in the development of the Federal Tribunal. On the ground of the constitutional amendment calling for the establishment of a federal administrative court, the Tribunal was vested with administrative law jurisdiction for the first time, and the powers of the two other branches of government in these matters were limited. The administrative law chamber of the public law department of the Federal Tribunal, besides its appellate jurisdiction, exercises original jurisdiction in a few cases provided for by the Judiciary Act,\footnote{Judiciary Act §§ 110, 111.} particularly where the pecuniary responsibility of the Confederation is involved, as in cases of accidents happening during military exercises, of claims of federal employees in connection with their service, etc. Other cases may be provided for by legislation.\footnote{Judiciary Act § 111(i).}

Besides, "the cantons have the right to give the federal administrative court jurisdiction in administrative disputes regarding cantonal affairs," if the federal legislature gives its assent.\footnote{Swit. Const.-art. 114A, cl. 41, supplemented by Judiciary Act § 116.} In such cases, the Federal Tribunal's character is that of a cantonal court.