Introduction to the study of :

"The Law of the Constitution".

Albert Ven Dicey; 1885.

Liberty Fund Books, Indianapolis.

https://catalog.libertyfund.org/law/introduction-to-the-study-of-the-law-of-the-constitution-paperback-detail.html

Quoted Chapter: ""Rule of Law Compared With Droit Administratif".

C. Stewart: Commentary:

An English Legal Scholar of the 1800's named Albert Ven Dicey was well recognized by prominent Legal Scholars after him as holding an equivalent status on these matters of Anglo/American Constitutional-Law, as did William Blackstone himself during the 1700's. In his Treatise: "The Law of the Constitution" (Introduction to the study of, 1885, a 400+ page work); Professor Dicey devotes an entire Chapter to the Profound Differences between our Anglo/American Constitutional-Republican "Rule of Law", as compared with the "Administrative" Proceedings. The profound growth of "Administrative-Law" with-in what passes as a Constitution for the Country of France, is reflected in the Title for the 60-page Chapter, which is called" the "Rule of Law Compared With Droit Administratif"; & where-in Professor Dicey opens, & then continues, as follows:

"In many continental countries, and notably in France, there exists a scheme of administrative law – known to Frenchmen as droit administratif – which rests on ideas foreign to the fundamental assumptions of our English common law, and especially to what we have termed the rule of law. ... Our aim should be ... to make clear ... how ... administrative law makes the legal situation of every government official in France different from the legal situation of servants of the State in England, and in fact establishes a condition of things fundamentally so inconsistent with what Englishmen regard as the due supremacy of the ordinary law of the land. ... It is only when we examine the administrative law of France ... that we can rightly appreciate the essential opposition between our existing English rule of law and the fundamental ideas which lie at the basis of administrative law, not only in France but in any country where this scheme of State or official law has obtained recognition. ...

... the droit administratif of France ... rests ... on two ideas alien to the conceptions of modern Englishmen. The first of these is that ... every servant of the government, possesses ... a whole body of special rights, privileges, or prerogatives as against private citizens, and the extent of these rights, privileges, or prerogatives is to be determined on principles different from the considerations which fix the legal rights and duties of one citizen towards another. An individual in his dealings with the State does not, according to French ideas, stand on anything like the same footing as that on which he stands in his dealings with his neighbor.

... Nor were the leaders of the French opinion uninfluenced by the traditional desire felt as strongly by despotic democrats as by despotic kings to increase the power of the central government by curbing the authority of the law courts. ... No part of revolutionary policy or sentiment was more heartily accepted by Napoleon than the conviction that the judges must never be allowed to hamper the action of the government. He gave effect to this conviction in two different ways. ... he constituted ... two classes of Courts. The one class consisted of "judicial" or, as we should say, "common law" Courts. ... The other class of so-called Courts were and are the administrative Courts ... These two kinds of Courts stood opposed to one another. ... The law of 16-24 August 1790 is one among a score of examples which betray the true spirit of the Revolution. The judicial tribunals are there-by forbidden to interfere in any way what-ever with any acts of legislation. ... The judges must

not, under penalty of forfeiture, disturb or in any way interfere with the operation of administrative bodies, or summon before them administrative officials ... . Napoleon had imbibed to the utmost the spirit of these enactments. He held ... : "the judges are the enemies of the servants of the State, and that there is always reason to fear their attempts to compromise the public interests by their ... interference in the usual course of government business."

The fourth and most despotic characteristic of droit administratif lies in it's tendency to protect from the supervision or control of the ordinary law Courts any servant of the State who is guilty of an act, however illegal ... ."

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That in a confederation like the United States the Courts become the pivot on which the constitutional arrangements of the country turn is obvious. Sovereignty is lodged in a body which rarely exerts its authority and has (so to speak) only a potential existence; no legislature throughout the land is more than a subordinate lawmaking body capable in strictness of enacting nothing but bye-laws; the powers of the executive are again limited by the constitution; the interpreters of the constitution are the judges. The Bench therefore can and must determine the limits to the authority both of the government and of the legislature; its decision is without appeal; the consequence follows that the Bench of judges is not only the guardian but also at any given moment the master of the constitution. ...

From the fact that the judicial Bench supports under federal institutions the whole stress of the constitution, a special danger arises lest the judiciary should be unequal to the burden laid upon them. In no country has greater skill been expended on constituting an August and impressive national tribunal than in the United States. Moreover, as already pointed out, the guardianship of the Constitution is in America confided not only to the Supreme Court but to every judge throughout the land. Still it is manifest that even the Supreme Court can hardly support the duties imposed upon it. No one can doubt that in the varying decisions given the legal-tender cases, or in the line of recent judgements of which *Munn v. Illinois* is a specimen, show that the most honest judges are after all only honest men, and when set to determine matters of policy and statesmanship will necessarily be swayed by political feelings and by reasons of state. But the moment that this bias bias becomes obvious a Court loses its moral authority, and decisions which might be justified on grounds of policy excite natural indignation and suspicion when they are seen not to be fully justified on grounds of law. American critics indeed are to be found who allege that the Supreme Court not only is proving but always has proved too weak for the burden it is called upon to bear, and that it has from the first been powerless whenever it came into conflict with a State, or could not count upon the support of the Federal Executive. These allegations undoubtably hit a weak spot in the constitution of the great tribunal. Its judgements are without force, at any rate against a State if the President refuses the means of putting them into execution. "John Marshal", said President Jackson, according to a current story, "has delivered his judgement, let him now enforce it, if he can"; and the judgement was never put into force.