

2 INTRODUCTION .

TO THE STUDY OF THE

LAW OF THE CONSTITUTION

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Part II.

public opinion counted for a great deal more than in Spain, in the petty States of Italy, or in the Principalities of Germany. All the evils of despotism which attracted the notice of the world in a great kingdom such as France existed under worse forms in countries where, just because the evil was so much greater, it attracted the less attention. The power of the French monarch was criticised more severely than the lawlessness of a score of petty tyrants, not because the French King ruled more despotically than other crowned heads, but because the French people appeared from the eminence of the nation to have a special claim to freedom, and because the ancient kingdom of France was the typical representative of despotism. This explains the thrill of enthusiasm with which all Europe greeted the fall of the Bastille. When the fortress was taken, there were not ten prisoners within its walls; at that very moment hundreds of debtors languished in English gaols. Yet all England hailed the triumph of the French populace with a fervour which to Englishmen of the twentieth century is at first sight hardly comprehensible. Reflection makes clear enough the cause of a feeling which spread through the length and breadth of the civilised world. The Bastille was the outward and visible sign of lawless power. Its fall was felt, and felt truly, to herald in for the rest of Europe that rule of law which already existed in England.¹

¹ For English sentiment with reference to the servitude of the French, see Goldsmith, *Citizen of the World*, iii. Letter iv. ; and see *Ibid.*, Letter xxxvii. p. 143, for a contrast between the execution of Lord Ferrers and the impunity with which a French nobleman was allowed to commit murder because of his relationship to the Royal

We mean in the second place,¹ when we speak of the "rule of law" as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

Chapter
IV.

Every man
subject to
ordinary
lawadmini-
stered by
ordinary
tribunals.

In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor,² a secretary of state,³ a military officer,⁴ and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person. Officials, such for

family; and for the general state of feeling throughout Europe, Tocqueville, *Œuvres Complètes*, viii. pp. 57-72. The idea of the rule of law in this sense implies, or is at any rate closely connected with, the absence of any dispensing power on the part either of the Crown or its servants. See Bill of Rights, Preamble 1, Stubbs, *Select Charters* (2nd ed.), p. 523. Compare *Miller v. Knox*, 6 Scott, 1; *Attorney-General v. Kissane*, 32 L.R. Ir. 220.

¹ For first meaning see p. 183, *ante*.

² *Mostyn v. Fabregas*, Cowp. 161; *Musgrave v. Pulido*, 5 App. Cas. 102; *Governor Wall's Case*, 28 St. Tr. 51.

³ *Entick v. Carrington*, 19 St. Tr. 1030.

⁴ *Phillips v. Eyre*, L. R., 4 Q. B. 225.

Part II.

example as soldiers¹ or clergymen of the Established Church, are, it is true, in England as elsewhere, subject to laws which do not affect the rest of the nation, and are in some instances amenable to tribunals which have no jurisdiction over their fellow-countrymen; officials, that is to say, are to a certain extent governed under what may be termed official law. But this fact is in no way inconsistent with the principle that all men are in England subject to the law of the realm; for though a soldier or a clergyman incurs from his position legal liabilities from which other men are exempt, he does not (speaking generally) escape thereby from the duties of an ordinary citizen.

Contrast in
this respect
between
England
and France.

An Englishman naturally imagines that the rule of law (in the sense in which we are now using the term) is a trait common to all civilised societies. But this supposition is erroneous. Most European nations had indeed, by the end of the eighteenth century, passed through that stage of development (from which England emerged before the end of the sixteenth century) when nobles, priests, and others could defy the law. But it is even now far from universally true that in continental countries all persons are subject to one and the same law, or that the Courts are supreme throughout the state. If we take France as the type of a continental state, we may assert, with substantial accuracy, that officials—under which word should be included all persons employed in the service of the state—are, or have been, in their official capacity, to some extent exempted from the ordinary law of the land, protected from the

¹ As to the legal position of soldiers, see Chaps. VIII. and IX. *post*.