Geranne Lautenbach


A few years ago, our constitutional law professor confided to the first-year students, which we were at the time, that using the words “Dicey”, “separation of powers” and “rule of law” in our final term paper, being as fundamental as these concepts were, would enable us to instantly reach our second year. Geranne Lautenbach not only mentions these three words in her book, but she demonstrates that the national approach to the last term has been influenced by international law, and, in particular, by the European Convention on Human Rights (“ECHR”) and the case law of the European Court of Human Rights (“ECtHR”).

Why is such a focus made, specifically, on the ECHR? The author makes it clear that her choice was guided by the frequent references to the rule of law by the Strasbourg Court, along with the “increased attention” to the concept in international law literature (p. 1). This led Geranne Lautenbach to devote her PhD thesis – defended in 2012 – to the topic, and from which initiative the book reviewed herein is the result (p. vii).

As the author makes clear at the very beginning of her work, her purpose is not to write yet one more study on a topic that has been discussed for decades, if not centuries. What matters to her is to approach the rule of law concept through international law.

In order to do so, she distinguishes, first, two different sets of rule of law standards that are encompassed by international law: one providing for the international legal order itself, and the other regarding the implementation of the rule of law in national legal orders. However, she excludes the first set of standards, as difficulties arose in transposing the rule of law concept to the international legal order because of that concept’s inherent characteristics. Indeed, the rule of law concept requires, according to Dr. Lautenbach, a control
of the exercise of governmental power (p. 4) and “is essentially based on the view that the society is centred on the individual” (p. 5) – both notions being absent, or only primitive, in the international legal order. Geranne Lautenbach thus devotes her study to the international rule of law standards that are applicable to national legal systems, especially by means of the ECHR (pp. 9–10). By focusing on the case law of the ECtHR, the author warns the reader that the rule of law is addressed “as a legal concept, and not so much as a political ideal” (p. 13), before acknowledging that “both aspects cannot be completely separated in the case law” (p. 14).

According to Dr. Lautenbach, the rule of law concept is based on the “fundamental notion of protecting the individual from arbitrary power” (p. 15). In her view, it originally emerged in English law, and may be compared to the French Etat de droit and the German Rechtsstaat theories, as they are all meant to “subject[... ] the relations between individuals and governmental authorities to the law; limiting arbitrary governmental power and preserving the authority of individuals” (p. 15). Geranne Lautenbach’s objective is to determine how the ECtHR, in interpreting the Convention, influenced the scope and content of the rule of law in the national legal orders of the States Parties (p. 16).

After explaining her methodology in Chapter 1, the following chapter is devoted to a theoretical analysis of the concept of the rule of law in the three above-mentioned domestic legal orders, i.e. that of the United Kingdom, Germany and France – all of these States being parties to the ECHR. As “contested and flexible” (p. 19) a concept as it may be, the author demonstrates the existence of a core common element to all definitions of the rule of law, i.e. the principle of legality that lies at “the heart of the rule of law concept and is connected to all aims and elements that are understood of [it]” (p. 37). According to the author, it is ensured through “quality requirements” (p. 67) of the law (i.e. generality, promulgation, non-retroactivity, etc.) that shall only be guaranteed if all of the “prerequisites” (separation of powers and judicial safeguards, human rights protection, and respect for the principle of democracy) are ensured. She also asserts that, whereas historical and institutional settings might have influenced each country’s institutionalization of the concept, the substantial elements can be traced to each and every of one of these systems (p. 35). Immediately thereafter, Geranne Lautenbach emphasizes that these differences tend to be reduced due to the influence of international and European instruments. Indeed, review of the legality principles by the legislative and executive authorities in each country has become more and more subject to domestic judicial control, which has been altered – inter alia – by the rulings of the ECtHR (p. 37). References to each of these elements in the