TEME, Vol. L, Nº 1, January – March 2026, pp. 251–257

Book Review https://doi.org/10.22190/TEME260304016D
Received: March 4, 2026 UDC 340.131(048.83)
Accepted March 5, 2026

THE RULE OF LAW: ITS RISE AND FALL

Thor von Waldstein, *Der Rechtsstaat nach seinem Ende*
Verlag Antaios, Schnellroda, 2024, p. 96.

Dušan Dostanić*

Institute for Political Studies, Belgrade, Serbia

ORCID iD: Dušan Dostanić https://orcid.org/0000-0003-1602-8684

INTRODUCTION

The phrase 'rule of law' is ubiquitous, today prevalent even more so than in the 19th century when it was first coined. Everyone uses when criticising or defending something, leading to a sense of appropriation or evasion. With such widespread use and positive association, one might assume that everything is in order with the rule of law. However, it appears that this term is linked to various interpretations, and few can precisely define it. Definitions found in literature often fail to reflect reality.

German political scientist and lawyer Thor von Waldstein argues that the rule of law currently exists only on paper, and cannot address the political challenges of the 21st century. In his booklet, he presents ten theses explaining the historical significance of the rule of law, its evolution, and its current shortcomings. Waldstein challenges the belief that the rule of law safeguards against arbitrary actions, suggesting that we are deceiving ourselves.

The concept of a 'post-rule of law' (Sieferle)[1] raises important questions. Waldstein explores the transition from the constitutional ideal of the pre-March period to the "conceptual promiscuity" of the late Federal Republic of Germany (p. 11). While Waldstein primarily focuses

* Corresponding author: Dušan Dostanić, Institute for Political Studies, Dobrinjska 11, 11000 Belgrade, Serbia | dusan_dostanic@yahoo.co.uk

[1] See: Rolf-Peter Sieferle, *Das Migrationsproblem*, Manuscriptum Verlag, Waltrop/Berlin, 2017, 114.

on the German experience, his insights may have broader applications across different countries.

The first thesis is that the rule of law is a specific "politically polemical concept" of the German bourgeoisie, which emerged during the 19th century, and is therefore associated with that era (p. 12). Citing a whole series of theorists from the 19th century, Waldstein concludes that the rule of law, as understood in this way, was, on a legal level, exactly what Ferdinand Lassalle criticised on a political level as the 'night watchman' state. The author acknowledges weaknesses in this understanding but emphasises that this concept became the main weapon of German liberalism, which challenged the previous model of statehood. To understand what the rule of law is, one must consider the specific political situation.

The author's second thesis suggests that the concept of the rule of law during the Reich and the Weimar period only played a transitional role. While some aspects of the constitutional state were incorporated into the prevailing notion of the state at that time, the importance of politics remained unquestioned (p. 17). In the Reich, according to Otto Mayer, the rule of law figured as "a state of well-regulated administrative law," with a widespread belief that "the idea of a constitutional state alone is not enough to fully understand the nature of the state and its responsibilities" (Treitschke). It can be said that the individualistic idea of the rule of law had already played its role at that time, as it was overshadowed by the creative forces of national and social ideas (Thoma). Additionally, neither the Weimar Constitution nor the commentaries of Gerhard Anschutz mention the term rule of law. With the fall of the monarchy and the Kaiser's authority, which it represented, the republic was left without its own political idea of order, which was essential for maintaining stability in a state resembling civil war. The Weimar case, as Waldstein points out, demonstrates that legality alone cannot substitute for legitimacy.

In the third thesis, the author demonstrates that during the Third Reich, the traditional concept of the rule of law was viewed as a liberal hindrance, which needed to be overcome in order to restore the national ability to action. However, the term was also co-opted and rebranded as the "German rule of law" and infused with National Socialist ideologemes (p. 21). Even before the NSDAP rose to power, Otto Koellreitter advocated for a 'national constitutional state' that prioritised the security of the national order of life. Despite this, the Weimar Constitution remained in effect through the entire period.

According to Waldsteins fourth thesis, the Basic Law of 1948/1949 and the constitutional order based on it were not created under fortunate circumstances. It was not the defeated people of 1945, i.e., the (West) German people as sovereign, but the Allied occupation forces, who established the framework for the future constitutional state, established through the "constitution" (p. 26). In other words, the Federal Republic of Germany

was not established as a 'normal state,' but rather according to Winfried Martini's formula, as a "state without responsibility".[2] In the 'disfavour of zero hour,' a constitutional experiment was initiated that wanted to replace the failed Weimar attempt, eliminate the memory of the National Socialist regime and build upon the liberal traditions of the 19th century. However, the primary flaw of this experiment was its lack of democratic legitimacy from the outset. Waldstein notes that even Carlo Schmid (SPD) acknowledged the provisional nature of the Basic Law during the Parliamentary Council, emphasising that it was not a real state constitution, but rather a Basic Law for a 'fragment of the state,' with the Occupation Statute being the only existing constitution, whether written or unwritten (p. 28). Consequently, the Federal Republic of Germany is not a state in its full sense, but rather a "state-like entity" (Schmid). In his address, Schmid essentially discusses "the organization of a modality of foreign rule", assuming the recognition of the foreign power as both "superior and legitimate."[3] In essence, Waldstein argues that the true architects of the Basic Law were the Allies, and that *ab origine* there was no legal framework for the sovereign constitution-making of (West) Germans. Therefore, all the flaws and weaknesses of the Basic Law are a direct result of its origins and the intentions of the victorious Western powers.

The German unification of 1990 did not bring about significant changes, as the Basic Law remained in effect with only minor adjustments. However, Article 146 stipulated that the Basic Law would no longer be valid once a constitution freely chosen by the German people was established. Waldstein highlights that the constitutional state of the Federal Republic of Germany lacks democratic legitimacy, leading to what he refers to as the 'cult of the constitution.' As a result, it can be argued that the sovereignty of the Federal Republic of Germany is, at the very least, incomplete.

This brings us to the fifth thesis, which focuses on the 'guardian of the constitution' – the Constitutional Court in Karlsruhe. Under its leadership the shift from a formal to a value-based and ethical legal state occurred gradually. This transformation involved the guarantee of individual freedom being reshaped into a system of values that significantly impact both the private and public life of citizens. Throughout this evolution, the constitutional and legal framework outlined in the Basic Law transitioned into a comprehensive value state (Wertestaat) that now governs in aspects of life (p. 31). Waldstein argues that since its establishment in the 1950s, the Constitutional Court has set the country on a path towards a judicial dictatorship, which distinguishes it from

[2] Winfried Martini, *Freiheit auf Abruf – Die Lebenserwartung der Bundesrepublik*, Köln, Berlin 1960, p. 155.

[3] See: Carlo Schmid: „Was heißt eigentlich Grundgesetz?", Rede im Parlamentarischen Rat am 8. September 1948; according to: Dietrich Murswiek: „Grundgesetz für die Bundesrepublik Deutschland. Kommentar zur Überschrift", in: *Kommentar zum Bonner Grundgesetz (= Bonner Kommentar)*, Hamburg 1986, p. 6

traditional forms of legal opinion because, through the premise of a hierarchy of values, the implementation of the law has been replaced by the implementation of values. A 1958 Constitutional Court ruling cited by Waldstein states: "Fundamental rights are primarily the defensive rights of the citizen against the state; however, the definition of fundamental rights in the Basic Law embodies an objective order of values, which, as a fundamental constitutional-legal decision applies to all areas of law" (p. 32). As the author states, this means that freedom is valid only within a certain value base. If someone deviates from this value base, he thereby loses political freedom, which is expressed through the banning of parties or the prohibition of working in the public service. The legal method is thus pushed aside in favour of a spiritual-scientific type of interpretation, and the rule of law degenerates into an organised unity of beliefs and experiences. Beneath the facade of values, the power relationship shifts towards the third branch of government, and the rule of law is replaced by a judicial state in which all roads lead to Karlsruhe. This practically means denying the modern state that emerged from religious wars and thrives on value neutrality. After the battle for values, there is not world harmony but the dictatorship of the subject who is the bearer of values. The doctrine of values of the Federal Constitutional Court led into in the theologisation of the Basic Law. Under the weight of values, the rule of law has crumbled, leaving law and order in its wake.

In his sixth thesis, Waldstein discusses the shift from the rule of law to the paternalistic welfare state that took place in the 1960s, which thrives on taking from some to give to others. We are talking about the millions of welfare recipients who have relinquished all responsibility in their own lives. If this system is challenged by an economic or foreign policy crisis, the welfare state and the vestiges of the rule of law associated with it will collapse.

The author refers to Ernst Forsthoff, who, in the early days of the Federal Republic of Germany, warned of the transformation from a legal state that guarantees freedom to a welfare state that guarantees benefits.[4] Politically, the welfare state is enticed to maintain control over citizens through redistribution, relying on the natural superiority of givers over receivers. Another renowned jurist, Ernst Rudolf Huber, also cautioned against totalitarian tendencies within the welfare state, or the 'supply state.'[5] These warnings were unheeded, and since the election of Willy Brandt as Chancellor in 1969, Germany has evolved into a state of lavish, redistribution, governance through redistribution, and mounting debt. This has cultivated a sociological archetype of a citizen who is not only lacking in independence, but also embraces learned helplessness as a program. Since Gerhard Schröder assumed the role of Chancellor in 1998, the architects of social engineering have successfully shifted their focus. While the model multicultural state tended to

[4] See: Ernst Forsthoff, *Der Staat der Industriegesellschaft*, München 1971.
[5] See: Ernst Rudolf Huber, *Nationalsttat und Verfassungsstaat*, Kohlhammer Verlag, Stuttgart, 1965.

asylum seekers, the homeless were left to fend for themselves under bridges. This illuminates how the state has lost touch with its sovereign – the German people – and has transformed into a 'total migrant state' (Dimitrios Kisoudis).[6]

Waldstein's seventh thesis argues that the constitutional state of the Federal Republic of Germany is incapable of handling 'a serious case.' Formed in the lee of foreign policy, the rule of law has become a meaningless term used to mask the state and its representatives' inability to address crisis situations in all areas of politics (p. 42). The Basic Law is described as a 'constitution without a serious case.' The Basic Law promotes an abundance of freedoms, creating a non-political order that is only possible in a secure state, free from foreign and domestic political turmoil, essentially a 'break from history.' Just as a vehicle cannot function with only brakes, the state cannot restrict itself to a judicial and protective role. Waldstein stresses that in 2015, during the migrant crisis, and in 2020, during the Covid pandemic, the state even failed to fulfil its duty of protecting individuals.

In the eighth thesis, Waldstein examines the phenomenon of the party state. He believes that the principle of the rule of law has been transformed into a neo-feudal demand for the rule of political parties. Instead of simply 'participating in the political shaping of the people's will,' as outlined in the constitution, parties, along with other institutions such as the media, universities, and unions, have oligopolised the political space in Germany and silenced dissenting voices. From their position of power, parties are fighting against the sovereign – the German people – using increasingly unconstitutional methods (pp. 44–45).

Waldstein builds on an age-old German criticism of parties dating back to Weber, highlighting the parties' takeover of the state and their view of the state as a means to achieve private goals. He argues that with the Basic Law, where parties are enshrined as a constitutional category, Germany began its journey towards a total party state, where parties dictate "what the people must desire". In a party state, the people are essentially non-existent, lacking the ability to exert political influence. Waldstein references Gerhard Leibholz's observation that, through decisions of the Constitutional Court, parties have become a 'constitutional body,' giving them immunity from criticism and hindering the implementation of citizens' opinions in political decision-making.

In the ninth thesis, Waldstein focuses on the legislature, i.e. parliament, as the core of a rule of law. The idea of parliament as a forum where the best solution for society should emerge from the debates among independent deputies has been overshadowed by the claims to power of various interest groups. State authority does no longer derives solely from the people, but also from non-democratic sources of power, such as economic entities, which operate without accountability and disregard the common

[6] See: Dimitrios Kisoudis, *Was nun? Vom Sozialstaat zum Ordnungsstaat*, Waltrop, Berlin, p. 101.

good (p. 52). According to Waldstein, the state has long since fallen prey to pressure groups, leaving only a facade behind which external forces can govern unhindered. Waldstein's definition of pluralism, derived from Schmitt, highlights the multiple social dimensions that shape state power. Political parties and various lobby groups now influence the political process, allowing illegitimate private entities to wield state power. The state's authority has eroded, giving rise to a 'pluralism of legality' within the framework of the rule of law. Specific groups, acting as 'shareholders of legality,' now dictate legislation and manipulate the public interest to serve private agendas. Waldstein points to the behaviour of the pharmaceutical lobby during the Covid-19 pandemic as a prime example of this phenomenon. The author also cites instances where the interests of the automotive industry or the banking sector take precedence over the common good. Additionally, private interests not only influence legislation, but there is a suspicion that they actually write it, while MPs obediently comply.

According to Waldstein, this unconstitutional state of affairs is further illustrated by increasing power claims of pluralist groups. This is evident in the connections between business concerns and public office holders. A closer look at Brussels and Strasbourg reveals the extent to which the rule of lobbies has developed. In this context, the rule of law is seen as belonging to the 'rest state' (Reststaat), associated with a society driven by selfish interests. Such a state can become totalitarian, not due to strength, but because of weakness. A weak state is compelled to feign authority by intervening in all aspects of the citizen's lives. Using an analogy by Rüdiger Altmann, such a state can be compared to a castrated cat that grows in size but lacks potency (p. 56).

Finally, in his tenth thesis, Waldstein discusses the disintegration of the civil world that once established the rule of law. Today the Federal Republic of Germany represents something like a state-like conglomerate of power *sui generis*. Its outgrowths have created a 'constitution behind a constitution,' in which the essential parts of the rule of law have been mutilated beyond recognition (p. 56). To support this claim, Waldstein provides several examples from German political life. Due to the omnipotence of the political parties, the principle of the separation of powers has effectively been abolished. Only political parties have the authority to decide on the appointment of individuals to all three branches of government. As a result, the much-touted system of checks and balances no longer exists, as there is a unity of power in the background. Additionally, the principle of advancement based on merit has long been disregarded, especially for the highest positions in the state. Advancement in government services now dependent on one's party affiliation. The principle of free election is also at risk. While technically still in place, it is under threat. The concept of a free mandate has been undermined by party discipline, leading to discrimination against opposition parties (Waldstein has in mind the Alternative for Germany). The principle of accountability, in which the chancellor is held responsible for the policies he

implements has been replaced in the party state by the principle of collective irresponsibility. In this system, everyone is credited with successes, while failures are blamed on someone else, or preferably no one at all. Waldstein cites Angela Merkel as saying: "I don't care if I'm blamed for the influx of refugees. They are here now." The process of removing chancellor through a vote of no confidence only exists on paper. Despite multiple violations of the constitution by Angela Merkel and Olaf Scholz, the German Bundestag has not exercised this right once since 1949. The independence of the judicial function is also threatened, not formally, but by election of individuals believed to be susceptible to external pressure. As Richard Thoma wrote, the rule of law is merely a shell that relies on the actions of living individuals for fulfilment. The decline of administrative and constitutional courts has been evident, according to Waldstein, during the corona period. This decline is also seen in the disregard for law and the de facto abolition of the presumption of innocence in political processes. Waldstein concludes that double standards exist in these situations.

In essence, the author argues that while the Federal Republic of Germany may take on various forms and functions as a state, it cannot truly be classified as a rule of law state. The concept of the rule of law exists solely within the text of the constitution with little reflection in reality. According to Sieferle, Germany is now, a 'post-rule of law society,'[7] where legality is reduced to a mere slogan, overshadowed by the influence of Davos billionaire socialists, the business tactics of Northern Californian internet giants and foreign clans in urban areas. Constitutional ideals and dormant courts have been largely ineffective in countering the growing dominance of anti-rule of law forces in everyday German life.

From start to finish, it is impossible to ignore Schmitt's influence on Waldstein's text. Almost all of his theses can be connected to Schmitt and his concepts, ranging from the critique of pluralism and parliamentarism to discussions of the tyranny of values and the total party state.

Waldstein's theses must be taken seriously, even though they mix several different approaches. The author's main point is that the rule of law emerged in a very specific context of the 19th century and that, with the end of the civil world, it became an antiquated concept that does not correspond to today's times. This implies that all attempts to return to the original meaning of the concept are impossible. Waldstein argues that we live in an interregnum where old concepts are no longer valid, and new ones have not yet been created. The rule of law is one of them.

REFERENCES

Thor von Waldstein, *Der Rechtsstaat nach seinem Ende*, Verlag Antaios, Schnellroda, 2024.

[7] See: Rolf-Peter Sieferle, *Das Migrationsproblem*, Manuscriptum Verlag, Waltrop/Berlin, 2017, 114.