

The Corrosion of the Law

The rule of law is crumbling – and not only in the USA. Laws are only respected now when they benefit one's own position. Guest commentary by FELIX UHLMANN.

Donald Trump has not yet won the presidential election, but his chances have certainly not diminished since his televised debate with Joe Biden. What might happen after his election, and how robust will American rule of law prove to be against an overreaching president? No one could know that, of course. World history is unpredictable, and one should not extrapolate from troubling developments of recent years heedlessly. Pessimism and realism are not the same thing, even if pessimists believe it. Between absolutely nothing and a full-blown coup d'état in the USA, almost anything is possible.

In the realm of wild speculation, I have a personal favorite: Hillary Clinton is arrested on January 10, 2025. It is a Friday. In the USA, the arrest elicits strong reactions, with schadenfreude prevailing. Europe takes note with a mixture of dismay and amusement. Experts expect Clinton to be acquitted of any charges of violating official secrecy laws. No one is actually worried; after all, the law works.

There is, however, good reason for concern: “The free, secularized state depends on preconditions that it itself is unable to guarantee” (Wolfgang Böckenförde). The law is the skeleton of the state; it holds up only as long as it is supported by society. Respect for the law is declining at an alarming rate, not only in the USA, but certainly there. And the USA often anticipates what will also happen in Europe. The alienation between law and society is not helped by a salacious trial involving false accounting of hush money payments to a porn star or doubts about the impartiality of the American Supreme Court. Indeed, such things can only reinforce it.

Constitutional obligations have been treated with nonchalance by parliament in Switzerland as well. Conversely, the law is seen increasingly as a mere weapon. An expert opinion of the Federal Office of Justice is just one voice among many. The climate ruling [of the ECHR in the KlimaSeniorinnen case] and the emerging condemnations of it are not particularly conducive to reconciling law and society either. What this promotes instead is an increasingly more narrow utilitarian conception: Law is right when it benefits one's own political position. The arrest of Hillary Clinton on January 10, 2025 would therefore come as no surprise to anyone, and the blatant abuse of the law would outrage few who are not politically close to Clinton. This desensitization is the true threat. The intrinsic value of the law is no longer recognized. It is beginning to corrode.

The purported unassailability of the law is overestimated. Law is at best flexible, and at worst tractable. Ronald Dworkin's conception of individual rights as “trumps” is now ironic in name and illusory in content. The trumps have no, or only limited, validity. They get caught up in the web of public interests, as the pandemic emphatically demonstrated – and quite rightly, by the way, because a legal system without trade-offs may be predictable but it is not just.

Applying the law is not a math problem. The law is only as good as the people who make use of it. When civil servants and judges fear exposure, dismissal, or even arrest, the *cordon*

sanitaire of the constitutional state crumbles. And it cannot be ignored that even a vague fear of repercussion has a lasting effect on the behavior of people in positions of authority. This “chilling effect” makes offices and courts freeze up. Ideologues and opportunists will then contribute to the degeneration of the law. Legal certainty will be their first victim. Then it will be Hillary Clinton's turn.

What does this mean for Switzerland? It has copied much from the USA, its “sister republic,” but it has been wary of a strong presidency: the function of the Swiss head of state is divided among seven – a strange hydra of Helvetian character, a chain of links in a pedantic legal equalization of all the members of the Federal Council.

That alone made any talk of a “COVID dictatorship” in Switzerland ridiculous. A dictatorship with Simonetta Sommaruga and Ueli Maurer faithfully united in a Helvetian Junta? Seriously? This does not mean that the pandemic restrictions should not be critically examined. But while it is true that after the Second World War, the Federal Council had certainly acquired a taste for a plenipotentiary regime, there was no sign of Switzerland slipping into a dictatorship during the coronavirus pandemic. The deliberate weakening of the Swiss executive branch has often been ridiculed. We shall see in the USA whether the fears of the Swiss founders were justified.

The Swiss system is also generally one built on the fragmentation rather than the inhibition of power – as particularly evident in its three-tiered federalist system, where, one suspects, certain baked-in inefficiencies must be fully accepted. The USA has strong constituent states as well, which is often overlooked. There is something there to counter an overbearing president. From a legal perspective, it makes sense that in the movie *Civil War* the president is fighting against rebellious states. The USA has a strong Supreme Court, which plays an important role in the system of separation of powers. However, its authority is one of law. The Supreme Court has no army and no National Guard. The degradation of the law is particularly damaging here. The Supreme Court needs the centralized power of the president, as was made clear, for instance, in the fight to end racist policies in the individual states. In the struggle for power against the president, the Supreme Court can only survive on the basis of the authority of its members and the law. If this is lacking, the President can afford to ignore the Supreme Court. The court's recent decision regarding presidential immunity is particularly regrettable in this respect, not necessarily because of its content.

Questions of immunity for members of the executive and legislative branches relate to a key balancing mechanism between the overreach of power on the part of magistrates on the one hand and excessive restraint on the other. In normal times, the judgment would be entirely plausible. But times are not normal. The truly regrettable thing about the Supreme Court's ruling is that the decision was made exactly along party lines. Another brick in the wall. The reluctance of the judiciary to intervene in political processes is understandable. In the Zurich “Garcia” case, the Federal Court had to decide whether a politician who changes parties shortly after the election can be sanctioned not only politically, but also legally, because voters were misled. The Federal Supreme Court took this path in full awareness that it was walking a tightrope here.

The legal concept of the “political question” has a long tradition and is an expression of judicial respect for the political process. The law should not be made into collateral damage in a confrontation between the highest powers of the state. This is precisely why the climate ruling and its condemnation in Swiss politics are so damaging. Regardless of who is responsible for what in this dispute, this conflict is causing considerable damage to the law. The Federal Council is now in the unenviable position of having to comment on the situation. Of course, one could take a more positive view: The climate ruling has burst a boil that has been festering for some time. Perhaps it is a good thing when questions of the separation of powers are not just academic but land at the center of society.

The constitutional troubles that might threaten Switzerland would probably take an institutional form, rather than that of a battle between the president, the constituent states, and the Supreme Court. Switzerland has an almost radical system in terms of direct democratic rights; there is no inhibition of powers here. The entire state system is open to plebiscite through the mechanism of a popular referendum. Mandatory popular law and the provision of the possibility to completely revise the Federal Constitution leave room for the kind of restructuring of Switzerland that the president of Argentina could only dream of – or the adherents of the exact opposite ideology.

No one would deny that today the political system is in a worse position than in the past to absorb extreme popular initiatives. Switzerland’s road to dictatorship might be paved by formally flawless constitutional law. That is not to say that the corrosion of the law is not also a cause for concern in Switzerland and should not be the subject of wider discussion. But there is not yet cause for hysteria, certainly not in Switzerland, where despite frequent vilification, the political system is doing a lot of good. Donald Trump has not yet been elected. And Hillary Clinton has not yet been arrested. And that is exactly why we should be talking about the value of the law today.