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Karl Loewenstein

Karl Loewenstein (November 9, 1891 in Munich – July 10, 1973 in Heidelberg) was a German philosopher and political scientist, regarded as one of the prominent figures of Constitutional law in the twentieth century.

His research and investigations into the deep typology of the different constitutions have had some impact on the Western constitutional thought. He studied in his native city of Munich (Bavaria), where he got a doctor's degree in Public law and Political science.

When Adolf Hitler's Nazi Party took power in 1933, he was exiled and went to the United States, the country where he would carry out most of his doctrinal work and writings.

Contents

His philosophical and political views

Loewenstein has a clear leaning towards liberal democracy, as shown in the most important book he wrote, "Political Power and the Governmental Process".[1]

Constitutional classification

Original and derived constitutions

- **Original constitutions**: Their contents have been *truly* innovating for the history of constitutionalism within a particular country, or the ones that *inaugurate* a new doctrine or political spirit. They introduce institutions or political solutions that have not been

tested before in a particular territory. Among them are the following ones:

- The 1787 United States Constitution.
- The 1791 and 1793 French and Napoleonic constitutions.
- The 1831 Belgian Constitution.
- The German 1919 Constitution, under the Weimar Republic (1919–1933).
- The 1918 and 1924 Soviet socialist (communist) constitutions.

- **Derived constitutions**: They follow the basic fundamental *traits* left by the original constitutional convention. Naturally, most present-day constitutions worldwide are derived ones. But he alleges that some post World War II European constitutions (such as the 1949 West German one) are *partially* derived.

Ideological-programmatic and utilitarian constitutions

- **Ideological-programmatic constitutions**: They convey an *ideological burden* in their articles, and they mean to show that the new State being constituted will defend some sort of "creed". Among them there are the first constitutions born during the European liberal revolutions *tinged* with that ideology (like the 1791 French constitution, the 1812 Spaniard one, or the 1831 Belgian one). Also, the fascist and socialist (Marxist) constitutions fall into this category.
- **Utilitarian constitutions**: They present, specially in their organic part, the structural and functional organization of the State's institutions. Although they have an ideological background, it is *diluted* within their text.

Ontological classification

Loewenstein states that there are several types of Constitutions, but a *true* constitution is one that, besides containing essential guarantees and an outline about the organization of the supreme political institutions of a country, also *incarnates* the deepest values of liberal democracy, as well as the (historical) reality of the social group it will be imposed upon. This is what he calls "ontological classification".

- **Ontological classification**: Pays attention to the *real* effectiveness of the constitutional text and the way in which it is assimilated by the *social body*. Loewenstein draws a distinction among:

Analytically, Loewenstein considers three different kinds of constitutions:

- **Normative constitution**: It is *really* enforced, felt or "lived" by both the political rulers and the citizens in general. It is an *effective* constitution that ultimately controls or governs the political processes within a particular country and the democratic or republican principles it claims to uphold clearly corresponds to the *real* political practice. The (Federal) Constitution of the United States is an example of these virtuous and "alive" ones, which are "lived" by the societies ruled by it. Loewenstein uses the analogy of a *suit that perfectly fits* its user.
- **Nominal constitution**: Its contents not always corresponds to the local reality, that is, the *real* policies carried out within a country. Its text is mainly (or even only) nominal and thus it is not really enforced, due to the lack of appropriate conditions or because the *social body* is not still ready for them. Nevertheless, it may have an *educational value* for the people in general, and might become a normative constitution sometime in the

future (in the long-term). Loewenstein claims that most of the current world constitutions are *nominal* to some extent. He compares them to a *badly tailored suit*.

- **Semantic constitution** (which he also called "pseudo-constitution") is a fundamental law enforced to formalize and legalize the monopoly of power *previously* held by some social and/or economic groups, who in fact may have already become *illegitimate* (compare with the marxist concept of superstructure). It is a clear means by which dictatorial governments pretend to *disguise* their authoritarianism or even totalitarianism. In fact, instead of *limiting* the government's power in favor of the individual rights, those so-called "constitutions" do exactly the opposite: they are meant to *reinforce* or strengthen an already oppressive *previous* political system. The historical or remaining communist regimes are *clear* cases or instances of this phenomenon: the former Soviet Union, the other Eastern Bloc countries, China, Cuba, etc. Loewenstein directly compares them with a mere *fancy dress.*

On the other hand, Loewenstein discarded the idea of trying to devise a "perfect theoretical constitution", instead claiming that "an ideal constitution has never existed, and will never exist".

Political systems

Regimes

Loewenstein claims that political regimes are divides into:

- **Autocracies**: *Real* power is concentrated in very few hands, who are virtually not subjected to any kind of parliamentarian or administrative control, and that do not recognize the traditional principle of popular sovereignty (or don't wish to do so). He includes in this group the remaining absolute monarchies (like the Saudi Arabian one) and presidential systems with a very strong executive authority, that have *degenerated* in Bonapartism (sometimes called "hyperpresidentialism").
- **Constitutional democracy**: Power is the expression of the sovereignty of the people, as individuals elected for political posts are subject to different controls that ensure the supremacy of the rule of law. Most present-day parliamentary republics and constitutional monarchies (sometimes called "pseudo-monarchies" in political science) fall into this group.

According to Loewenstein, this classification not only has to be made looking to the laws that regulate those institutions, but also to the political practices *actually* observed, because the mere existence of a constitution is *not* enough to tell whether a certain governments is a democratic or an authoritarian one.

A new tripartite division of power

Loewenstein considered it was extremely difficult to try to change the division of power into the executive, legislative and judicial branches -as established by Montesquieu- which is a sort of "sacred dogma" for the constitutional theory and practice of liberal democracies.

However, he presented a new *tripartite* division of power into (three) functions.

- **Determination of policies**: This means that the state authorities must choose among several different political possibilities that come before them.
- **Execution of political decisions**: That is, the implementation or carrying out of the previously selected policies.
- **Political control**: It involves the control of a political decision, by an organ a different governmental organ that took it, verifying that it was done following the standard pre-set rules.

The most efficient mechanism to *divide* power and to *control* the national political decisions is to *distribute* the main government functions into different "departments", and do the same with their subordinate equivalents in the state, provincial or regional level.

Power distribution means that the (usually three main) different administrative departments are like a *watertight compartments* that *mutually* control and limit the otherwise potentially expansive sphere of influence of the others. In the modern parliamentary and presidential republics this is traditionally done through *counterweights* usually referred to as "checks and balances". Loewenstein considers that this last function is the most important in his views about the tripartite division of the political power, because if it didn't exist the other two would automatically *fall apart*, as even the reach and implications of the national political decisions couldn't be determined or estimated.

Works

- *Minderheitsregierung in Großbritannien. Verfassungsrechtliche Untersuchungen zur neuesten Entwicklung des britischen Parlamentarismus.* Munich: Schweitzer, 1925, first in: *Annalen des deutschen Reiches* 56/58 (1923/1925).
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- *Political power and the governmental process.* Chicago, The University of Chicago Press, 1957.
- *Verfassungsrecht und Verfassungspraxis der Vereinigten Staaten* Berlin, Springer, 1959.
- *Staatsrecht und Staatspraxis Großbritanniens* Berlin, Springer-Verlag, 1967, 2 Vols.
- *Kooptation und Zuwahl. Über die autonome Bildung privilegierter Gruppen.* Alfred Metzner Verlag, Frankfurt am Main 1973, ISBN 3-7875-5230-8.

See also

- Constitutional law

References

1. https://www.amazon.com/Political-Power-Governmental-Process-Phoenix/dp/0226490386

External links

- Loewenstein's biography (https://web.archive.org/web/20090204071749/http://vergleich ende-politikwissenschaft.de/loewenstein.htm) (in German)