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Interpretation of the content of the “social state” principle in the legislation and positions of the supreme court of Canada

Interpretación del contenido del principio de “estado social” en la legislación y los cargos de la corte suprema de Canadá

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ABSTRACT

This paper is devoted to the analysis of the constitutional principle of “state sociality” in Canada, taking into account the implemented model of a social state. The method and features of securing the guarantees of the sociality of a state in the constitutional legislation of Canada are shown. Based on the analysis of the legislation, the authors made conclusions about the specifics of the sociality of the state in Canada. Analyzing the reflection of the “state sociality” principle in the judicial practice of the Supreme Court of Canada, the authors summarized its influence on the problems of a welfare state.

Keywords: social state, sociality of the state, welfare state, constitutional principle, court, Constitution.

RESUMEN

Este documento está dedicado al análisis del principio constitucional de la “socialidad estatal” en Canadá, teniendo en cuenta el modelo implementado de un estado social. Se muestran el método y las características de asegurar las garantías de la socialidad de un estado en la legislación constitucional de Canadá. Basado en el análisis de la legislación, los autores sacaron conclusiones sobre los detalles de la socialidad del estado en Canadá. Analizando el reflejo del principio de “socialidad estatal” en la práctica judicial de la Corte Suprema de Canadá, los autores resumieron su influencia en los problemas de un estado de bienestar.

Palabras clave: estado social, socialidad del estado, estado del bienestar, principio constitucional, tribunal, constitución.

RESUMO

Este artigo é dedicado à análise do princípio constitucional da “socialidade de estado” no Canadá, levando em conta o modelo implementado de um estado social. O método e as características de assegurar as garantias da sociabilidade de um estado na legislação constitucional do Canadá são mostrados. Com base na análise da legislação, os autores fizeram conclusões sobre as especificidades da sociabilidade do estado no Canadá. Analisando a reflexão do princípio da “socialidade de estado” na prática judicial da Suprema Corte do Canadá, os autores resumiram sua influência sobre os problemas de um estado de bem-estar social.

Palavras-chave: estado social, a sociabilidade do estado, estado assistencialista, princípio constitucional, tribunal, Constituição.

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1. INTRODUCTION

Sociality of a modern state is investigated, among other things, from the standpoint of its scientific justification [Aristov, 2016] and conceptual interpretations [Aristov, 2017] in the context of the features of a social state [Markheim, Novikova, Tonkov and Zhornik, 2015], the constitutional order and a decent standard of living [Zhornik, Markhgeym and Novikova, 2016]. At the same time, the constitutional experience of various states with signs of sociality is analyzed.

The Constitution of Canada does not contain norms that enshrining the principle of sociality of the state, but it contains certain provisions that reflect this principle in one way or another. Thus, in the preamble of the Canadian Constitutional Act of 1867, it is stated that the integration of the provinces serves their well-being. [Constitution Act, 1867]. Article 92 of the Canadian Constitutional Act of 1867 provides that the legislative assembly of each Canadian province has exclusive authority to adopt regulations, in particular, on the establishment, maintenance and management of hospitals, shelters, charities in the provinces, with the exception of marine hospitals [Constitution Act, 1867]. In accordance with Article 94A of the Canadian Constitutional Act of 1867, the Parliament of Canada is entitled to adopt legal acts on the provision of pensions in connection with the attainment of advanced age, as well as additional disability benefits regardless of age [Constitution Act, 1867].

2. MATERIALS AND METHODS

The methodological basis of the research is formed on the ground of a combination of scientific cognition methods: general scientific methods (analysis and synthesis), and specific scientific methods (formal legal and comparative legal).

3. RESULTS

Formation of the welfare of the community in Canada has passed four stages of development corresponding to the stages of economic and political development of the state. The Canadian encyclopedia defines these stages as follows:

- The early period from 1840 to 1890;
- The transition period that lasted from 1881 to 1940;
- The interventionist period that lasted from 1941 to 1974;
- The period of ensuring future well-being that began in 1975 and is currently ongoing [Welfare State, 2019].

At the beginning of the period of capitalist system development in Canada, the state activities carried out in opposition to poverty and disease among the population were mainly of a regulatory nature. The social security that existed during the period under review was provided mainly in the private sector and local authorities; it included the provision of assistance, care for the mentally and physically handicapped people, street children, and the maintenance of offenders in prisons. After the Confederation period in Canada, social security also remained unsystematic and fragmented. It is also worth noting that in the period under review, family was the basis of economic security, what also had a definite influence on social security from the state [Welfare State, 2019].

In the interim period of welfare state development in Canada, the main task of the state was to encourage profitable economic development of the private sector, but at the same time the state also began to take measures to ensure a large amount of skilled labor by regulating the interaction between capital and labor, as well as maintaining family [Welfare State, 2019].

The beginning of the interventionist period was marked by the beginning of formation of the Canadian welfare state. It was caused by the fact that by the beginning of World War II, the population of Canada had passed through the economic and political consequences of the Great Depression, and the state was given a leading role in economic and social life; it was expected that this would continue after the end of the war. In order to mitigate the consequences of Canada's participation in the Second World War, the federal authorities implemented a wide range of measures in the areas of housing provision, rent control, prices and wages level, regulation of labor relations, provision of pensions to veterans, education and other [Welfare State, 2019].

The first regulatory legal act which ensured the implementation of programs for the financing of social assistance on an ongoing basis, the Canadian Act "On Unemployment Assistance" was adopted in 1956 as a result of pressure from private charitable organizations and provinces to central authorities [Welfare State, 2019].

In compliance with the welfare state concept according to Asa Briggs as carrying out three main activities: ensuring a minimum level of income; providing protection against economic risks due to illness, old age or unemployment; the provision of a number of social services to all members of society, Canada became a welfare state after a series of social reforms in the 1960s [Welfare State, 2019].

According to another point of view, the Canadian welfare state was created in 1938 before the Second World War [Canada's social welfare state, 2019].

Canada's social security system has begun to undergo major transformations since the 1970s, and such changes continue to this day [Battle and Torjman, 2001].

Ken Battle and Sherry Torjman have proposed a new model of the welfare state, the implementation of which, in their opinion, is currently taking place in Canada and in the UK - the "post-social state" model. Such a state continues to pursue the same basic goals of social policy that the welfare state of the universalist model pursued more than half a century ago, but a post-social state of the new model seeks to find and implement new effective mechanisms that are more in line with the changing economic, political and social realities of the twenty-first century. This concept of a post-social state explicitly recognizes that a state is not able to provide the social sector fully independently, and emphasizes the need for assistance in the development and implementation of social programs from non-state actors, such as employers, trade unions, other social groups, accordingly [Battle and Torjman, 2001].

Ken Battle and Sherry Torjman also highlighted the following key characteristics of the Canadian post-social state (noting that the welfare system in Canada still contains elements of a universalistic and "residual" approach):

- Replacement of the universalistic approach to the implementation of income security policies with a broader and more progressive approach to the study of income;
- Special attention to the unforeseen consequences of the implementation of social programs which manifest themselves in destimulation of the population to engage in labor activity;
- Special attention to the interaction and relationships between social programs and the tax system;
- Intention to achieve a balance between "active" and "passive" social programs, between the use of reactive and preventive approaches;
- Intention to harmonize federal and provincial social programs, in particular, with the aim of reducing duplications and overlaps, and to ensure their interaction;
- Ensuring of financial stability of the social programs being implemented;
- Recognition of that there is a number of the parties concerned in the social policy, which include the public sector, the private sector and charitable organizations, as well as recognition of the need to ensure more efficient use of their resources through partnerships;
- Recognition of the important role of communities in the development and implementation of social policies;
- Focusing on the economic functions of social policy, especially in the field of education and training which consist in providing a competitive workforce;
- Focusing on the need to measure the results of social policy, as well as providing open reporting on them [Battle and Torjman, 2001].

By the mid-1970s, Canada became a modern welfare state with an integrated social security system [Durst, 2019].

Speaking about the history of formation of the Canadian welfare state, it is worth noting separately the period of ruling of the Brian Mulroney's government. He served as Prime Minister of Canada from 1984 to 1993 during which the idea of a welfare state in Canada went through significant changes. The progressive idea that the state should be responsible for the good life of its citizens degenerated to the idea of "the state gives alms to losers". During this period, the Canadian public authorities have rejected unanimously the idea on collective provision of facilities and services for the entire population. Even quite popular social programs were significantly reduced or completely eliminated. [Cohen, Morrison and Smith, 1995].

According to Canadian’s famous politician Stephen Dion, the federal structure of Canada played an important role in shaping the Canadian welfare state, since the two principles of freedom and solidarity are the basis for the implementation of both concepts: federalism and sociality of the state. A welfare state is based on individual freedoms, both political and economic, and on the natural and material form of solidarity among all our citizens. In the same way, federalism relies on the freedom granted to certain public authorities of all subjects within the framework of the federation to adopt legal acts in the areas defined for them by the Constitution.

As Angela Jao points out, the Constitution of Canada has traditionally been interpreted as providing the provinces with the prevailing jurisdiction in terms of welfare. Nevertheless, the federal authorities in Canada used other constitutional powers assigned to them in such a way that their role in social security was expanded; therefore, at present social security is under the jurisdiction of public authorities of both levels [Djao, 2014].

Compared with many other welfare states, Canada is not the most generous, but very well-developed social state. Compared to the most developed European welfare states, Canada offers a lower level of income redistribution, lower minimum wages compared to the average level of income, calculated for shorter periods of unemployment benefits, as well as a less progressive tax regime.

An important role in the interpretation of the constitutional principle of a social state is played by the Supreme Court of Canada.

As an example, let’s consider some of the relevant solutions to our research.

Resolution of the Supreme Court of Canada No. 2002 SCC 84 dated December 19, 2002 in the case of *Gosselin v. Attorney General of Quebec*.

In her dissenting opinion on this case, Judge Arbour pointed out that “an advanced modern welfare state like Canada has a positive moral obligation to protect the life, liberty and safety of its citizens.” At the same time, Judge Arbour also pointed out that the question of determining how such a moral obligation should be transferred to a legal one is rather controversial [Cohen, Morrison and Smith, 1995].

Resolution of the Supreme Court of Canada No. [1984] 2 SCR 447 dated November 22, 1984 in the case of *British Columbia Development Corporation v. Friedmann (Ombudsman)*.

In this ruling, referring to L. Hill, the Supreme Court of Canada noted that with the advent of the modern welfare state, the state’s invasion in the lives of individuals increased exponentially, and in addition, the state currently provides such services and benefits, and performs such functions that would have been unthinkable fifty years ago. Increased risks of unfair management and abuse of authority as well as too many councils, agencies and state corporations necessary for their implementation have appeared as a side effect of such changes. As a rule, the development of a more distant and impersonal professional management structure dehumanizes the interaction between citizens and those who serve them. This opinion was expressed by the Supreme Court of Canada in the context of studying the need for the institution of the Ombudsman.

4. CONCLUSIONS

As a result of the study, the following conclusions can be made about the impact of constitutional legislation and decisions of the Supreme Court of Canada on the problems of a welfare state (in terms of posing problems and ways to resolve them):

- A modern welfare state is obliged to protect life, freedom and security of its citizens;
- The Ombudsman institution is a guarantee for the implementation of the “sociality of the state” constitutional principle, and also restricts state bodies in matters of interference with the social rights of citizens.

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